16B Am. Jur. 2d Constitutional Law X A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

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Research References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1096 to 1099, 1100(1) to 1100(9), 2781 to 2785, 2787 to 2793, 2800, 2802, 2803, 2805, 2810 to 2812, 2814 to 2818, 2820 to 2823, 2826, 2827

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16B Am. Jur. 2d Constitutional Law § 685

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

a. In General

(1) General Considerations

§ 685. Constitutional prohibition on ex post facto laws

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 2781 to 2784, 2787, 2789, 2790

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Validity, Construction, and Application of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence, 89 A.L.R.6th 261

The Constitution of the United States prohibits the enactment of ex post facto laws by Congress,[1] and the Supreme Court has held that this prohibition cannot be contravened merely because Congress concludes that a particular measure is authorized by the Constitution as being "necessary and proper" to the discharge of its substantive legislative authority.[2] Through the prohibition of ex post facto laws, the framers of the United States Constitution sought to assure that legislative acts give fair warning of their effect[3] about what constitutes criminal conduct, and what the punishments for that conduct entail,[4] and permit individuals to rely on their meaning until explicitly changed.[5] The Ex Post Facto Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively.[6] To determine whether

a penal statute is an ex post facto law, a court first asks whether the law applies retrospectively; if it does not, the inquiry is at an end.[7] A law is retroactive or retrospective, for ex post facto purposes, if it applies to events completed or occurring before its enactment,[8] or if it changes the legal consequences of acts completed before its effective date.[9] Where a new legislative act applies only to conduct occurring after its enactment, it cannot be styled as an ex post facto law.[10] Thus, the Ex Post Facto Clause is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts.[11] The constitutional prohibition against ex post facto laws cannot be avoided merely by adding to a law a notice that it might be changed.[12] A law need not impair a vested right to violate the ex post facto prohibition.[13]

Observation:

The Ex Post Facto Clause was designed as an additional bulwark in favor of the personal security of the subject to protect against the favorite and most formidable instruments of tyranny that were often used to effect the most detestable purposes.[14]

The United States Constitution contains a similar prohibition against enactment of ex post facto laws by the states.[15] Additionally, many state constitutions include a provision prohibiting the enactment of such laws,[16] but other state constitutions do not.[17] In some states, the Ex Post Facto Clause in a state constitution does not provide greater protection than that offered under the United States Constitution[18] and in interpreting the ex post facto prohibition in a state constitution, the state's supreme court looks to the United States Supreme Court's interpretation of the Ex Post Facto Clause of the United States Constitution.[19] However, in other states, their ex post facto clause is interpreted to provide even greater protections that its federal counterpart.[20]

The mere absence of an express provision in a state constitution protecting a certain right, including protection for ex post facto legislation, does not necessarily mean that such a right is not protected by Constitution.[21]

Practice Tip:

A defendant may elect to have a subsequently enacted law applied to him or her, and if the defendant does so, he or she cannot claim a constitutional violation.[22]

Footnotes

1 No ex post facto law shall be passed. U.S. Const. Art. I, § 9, cl. 3.

2 Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), referring to U.S. Const. Art. I, § 8, cl. 18.

3 Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); U.S. v. Kumar, 617 F.3d 612 (2d Cir. 2010); State v. Banks, 143 Conn. App. 485, 71 A.3d 582 (2013), judgment aff'd, 321 Conn. 821, 146 A.3d 1 (2016); People ex rel. Birkett v. Konetski, 233 Ill. 2d 185, 330 Ill. Dec. 761, 909 N.E.2d 783 (2009); State v. Fortin, 198 N.J. 619, 969 A.2d 1133 (2009); Commonwealth v. Lippincott, 2019 PA Super 118, 208 A.3d 143 (2019); State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009); State ex rel. Singh v. Kemper, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86 (2016).

The existence of an ex post facto violation turns on whether an individual was deprived of fair notice, not on an individual's right to less punishment. U.S. v. Kumar, 617 F.3d 612 (2d Cir. 2010); In re Personal Restraint of Dyer, 164 Wash. 2d 274, 189 P.3d 759 (2008).

4 Commonwealth v. Muniz, 640 Pa. 699, 164 A.3d 1189 (2017), cert. denied, 138 S. Ct. 925, 200 L. Ed. 2d 213 (2018).

5 Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); U.S. v. Kumar, 617 F.3d 612 (2d Cir. 2010); State v. Banks, 143 Conn. App. 485, 71 A.3d 582 (2013), judgment aff'd, 321 Conn. 821, 146 A.3d 1 (2016); Commonwealth v. Lippincott, 2019 PA Super 118, 208 A.3d 143 (2019); State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009); State ex rel. Singh v. Kemper, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86 (2016).

6 Johnson v. U.S., 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).

7 Lynch v. State, 346 Ga. App. 849, 815 S.E.2d 340 (2018).

The Ex Post Facto Clause in both State and Federal Constitutions only prohibit retroactive penal legislation. State v. Gibson, 182 A.3d 540 (R.I. 2018).

A statute is enforced retroactively, for purposes of an ex post facto challenge, if it governs conduct that preceded the statute's enactment. Doe v. Rausch, 382 F. Supp. 3d 783 (E.D. Tenn. 2019).

8 Temple-Inland, Inc. v. Cook, 82 F. Supp. 3d 539 (D. Del. 2015); State v. Hester, 449 N.J. Super. 314, 157 A.3d 865 (App. Div. 2017), judgment aff'd, 233 N.J. 381, 186 A.3d 236 (2018).

9 Lard v. State, 2014 Ark. 1, 431 S.W.3d 249 (2014); Riley v. New Jersey State Parole Bd., 219 N.J. 270, 98 A.3d 544 (2014).

10 People v. Appel, 51 Cal. App. 4th 495, 59 Cal. Rptr. 2d 216 (2d Dist. 1996).

Bureau of Alcohol, Tobacco, Firearms and Explosives' rule classifying bump-stock devices as "machineguns" under the National Firearms Act did not violate the Ex Post Facto Clause, where possession of bump stocks would become unlawful only after the rule's effective date. Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1 (D.C. Cir. 2019), judgment entered, 762 Fed. Appx. 7 (D.C. Cir. 2019).

11 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); Chichakli v. Trump, 242 F. Supp. 3d 45 (D.D.C. 2017), aff'd, 714 Fed. Appx. 1 (D.C. Cir. 2017); People v. Chilelli, 225 Cal. App. 4th 581, 170 Cal. Rptr. 3d 395 (2d Dist. 2014); Victorino v. State, 241 So. 3d 48 (Fla. 2018), cert. denied, 139 S. Ct. 328, 202 L. Ed. 2d 230 (2018); Shushunov v. Illinois Department of Financial and Professional Regulation, 2017 IL App (1st) 151665, 411 Ill. Dec. 762, 74 N.E.3d 71 (App. Ct. 1st Dist. 2017); State v. Gibson, 182 A.3d 540 (R.I. 2018).

As to initiation of punishment for previously innocent conduct, generally, see § 691.

As to legislation increasing punishment, generally, see §§ 694 to 701.

To prevail on an ex post facto challenge to a sentence, a defendant had to show both that the law he challenged operated retroactively, that is, that it applied to conduct completed before its enactment, and that it raised the penalty from whatever the law provided when he acted. Johnson v. U.S., 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000); Clay v. Massachusetts Parole Bd., 475 Mass. 133, 56 N.E.3d 145 (2016).

12 Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).

13 Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); State v. Pieper, 231 S.W.3d 9 (Tex. App. Houston 14th Dist. 2007).

As to impairment of vested rights, specifically, see §§ 741 to 746.

14 Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

15 No State shall pass any ex post facto Law. U.S. Const. Art. I, § 10, cl. 1.

16 Lynch v. State, 346 Ga. App. 849, 815 S.E.2d 340 (2018); People v. Robinson, 2017 IL App (1st) 161595, 419 Ill. Dec. 454, 93 N.E.3d 573 (App. Ct. 1st Dist. 2017); Patrick v. Butts, 12 N.E.3d 270 (Ind. Ct. App. 2014); Robinson v. State, 422 S.C. 78, 810 S.E.2d 32 (2018).

17 State v. Little, 127 Conn. App. 336, 14 A.3d 1036 (2011); Adelman v. Adelman, 58 Misc. 2d 803, 296 N.Y.S.2d 999 (Sup 1969) (no such prohibition is to be found in the New York State Constitution).

18 People v. Fredericks, 2014 IL App (1st) 122122, 383 Ill. Dec. 293, 14 N.E.3d 576 (App. Ct. 1st Dist. 2014); State v. Harris, 284 Neb. 214, 817 N.W.2d 258 (2012); Kammerer v. State, 2014 WY 50, 322 P.3d 827 (Wyo. 2014).

A state constitutional Ex Post Facto Clause is not interpreted more expansively than its federal counterpart. In re Contempt of Henry, 282 Mich. App. 656, 765 N.W.2d 44 (2009).

19 Hill v. Walker, 241 Ill. 2d 479, 350 Ill. Dec. 321, 948 N.E.2d 601 (2011).

Federal and state constitutional Ex Post Facto Clauses are evaluated under the same definition (State v. Bare, 197 N.C. App. 461, 677 S.E.2d 518 (2009) and have the same meaning. (In re Edward C., 223 Cal. App. 4th 813, 167 Cal. Rptr. 3d 536 (1st Dist. 2014)).

The courts construe the Ex Post Facto Clauses of the Federal and State Constitutions in a like manner. People v. Chilelli, 225 Cal. App. 4th 581, 170 Cal. Rptr. 3d 395 (2d Dist. 2014); State v. Gibson, 182 A.3d 540 (R.I. 2018).

20 Commonwealth v. Muniz, 640 Pa. 699, 164 A.3d 1189 (2017), cert. denied, 138 S. Ct. 925, 200 L. Ed. 2d 213 (2018).

21 State v. Little, 127 Conn. App. 336, 14 A.3d 1036 (2011).

22 Studnicka v. State, 679 So. 2d 819 (Fla. 3d DCA 1996); Brantley v. State, 268 Ga. 151, 486 S.E.2d 169 (1997).

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16B Am. Jur. 2d Constitutional Law § 686

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

a. In General

(1) General Considerations

§ 686. Definition of ex post facto law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2781, 2784, 2787, 2788(1) to 2788(3), 2790

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Validity, Construction, and Application of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence, 89 A.L.R.6th 261

Construction and Application of Statute of Limitations Applicable to Prosecution Under Federal Murder-for-Hire Statute (18 U.S.C.A. s1958), 86 A.L.R. Fed. 2d 97

An "ex post facto law" is one which reaches back in time to punish acts which occurred before enactment of the law.[1] The early and classic definition of the phrase "ex post facto law" is (1) every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime or makes it greater than it was when committed; (3) every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; and (4) every law that alters the legal rules of evidence and receives less or different

testimony than the law required at the time of the commission of the offense in order to convict the offender.[2] This definition has been quoted, referred to, paraphrased, and followed in many cases.[3]

The early definition, as set up by the Supreme Court, was modified to some extent by later decisions which defined an ex post facto law as one which, in its operation, makes that criminal which was not so at the time the action was performed or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to their detriment or disadvantage.[4] However, not every law which merely disadvantages a defendant retrospectively is an ex post facto law.[5] More recently, the Supreme Court has said that a law violates the Ex Post Facto Clause only if it punishes as a crime an act previously committed, which was innocent when done; makes more burdensome the punishment for a crime after its commission; or deprives one charged with a crime of any defense available under the law in effect when the act was committed.[6] This decision has shifted the emphasis away from examining whether a defendant has been "disadvantaged"[7] back to the original concept of an ex post facto law as being one which increases the punishment for a criminal act after it has been committed.[8] In any event, the ex post facto ban restricts governmental power by restraining arbitrary potentially vindictive legislation[9] and upholds the separation of powers by confining the legislature to penal decisions with prospective effects and the judiciary's and executive's applications of existing law.[10]

Practice Tip:

Two critical elements must be present for a criminal or penal law to be ex post facto: (1) it must be retrospective, i.e., it must apply to events occurring before its enactment; and (2) it must disadvantage the offender affected by it, which occurs if it punishes an act not punishable when committed.[11] A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence.[12]

Footnotes

1 Childers v. State, Dept. of Management Services, Div. of Retirement, 989 So. 2d 716 (Fla. 4th DCA 2008); Rider v. Com., 460 S.W.3d 909 (Ky. Ct. App. 2014).

2 Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 1 L. Ed. 648, 1798 WL 587 (1798).
The Constitution forbids the passage of "ex post facto laws," a category that includes every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).
As to initiation of punishment for previously innocent conduct, see § 691.
As to aggravating the degree of the crime resulting from the act, see § 692.
As to legislation increasing punishment, generally, see §§ 694 to 701.
As to legislation changing the rules of evidence, see § 711.

3 Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); In re Edward C., 223 Cal. App. 4th 813, 167 Cal. Rptr. 3d 536 (1st Dist. 2014); Solomon v. U.S., 120 A.3d 618 (D.C. 2015); People v. Adams, 404 Ill. App. 3d 405, 343 Ill. Dec. 685, 935 N.E.2d 693 (1st Dist. 2010); State v. Cowles, 757 N.W.2d 614 (Iowa 2008); Jones v. State, 883 N.W.2d 596 (Minn. 2016); Commonwealth v. Muniz, 640 Pa.

699, 164 A.3d 1189 (2017), cert. denied, 138 S. Ct. 925, 200 L. Ed. 2d 213 (2018); Crocker v. State, 260 S.W.3d 589 (Tex. App. Tyler 2008).

4 Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); U.S. v. Armstead, 114 F.3d 504 (5th Cir. 1997); U.S. v. Stover, 93 F.3d 1379 (8th Cir. 1996); U.S. v. Ortland, 109 F.3d 539, 46 Fed. R. Evid. Serv. 837 (9th Cir. 1997); U.S. v. Aranda-Hernandez, 95 F.3d 977 (10th Cir. 1996); Warren v. Commissioner of Mental Health, 43 Conn. App. 592, 685 A.2d 332 (1996); Crawford v. State, 669 N.E.2d 141 (Ind. 1996); State v. Quanrude, 222 N.W.2d 467 (Iowa 1974); State v. Myers, 260 Kan. 669, 923 P.2d 1024 (1996); State v. Keys, 694 So. 2d 1107 (La. Ct. App. 2d Cir. 1997), writ denied, 703 So. 2d 21 (La. 1997) and writ denied, 703 So. 2d 21 (La. 1997); State v. Brander, 280 Mont. 148, 930 P.2d 31 (1996); Henderson v. Lutche, 938 S.W.2d 428 (Tenn. Ct. App. 1996); State v. Smith, 198 W. Va. 702, 482 S.E.2d 687 (1996).

An "ex post facto law" is one which creates a new offense or changes the punishment, to the detriment of the accused, after the commission of a crime. Reeves v. State, 256 So. 3d 632 (Miss. Ct. App. 2018), cert. denied, 256 So. 3d 592 (Miss. 2018).

5 U.S. v. Aranda-Hernandez, 95 F.3d 977 (10th Cir. 1996); People v. Mesce, 52 Cal. App. 4th 618, 60 Cal. Rptr. 2d 745 (1st Dist. 1997) (the focus of an ex post facto inquiry is not on whether the legislative change produces some ambiguous sort of disadvantage but on whether any such change alters the definition of criminal conduct or increases the penalty for a crime); State v. Muhammad, 145 N.J. 23, 678 A.2d 164 (1996); State v. Cookman, 324 Or. 19, 920 P.2d 1086 (1996).

6 Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); In re DNA Ex Post Facto Issues, 561 F.3d 294 (4th Cir. 2009); Quinteros v. Hernandez, 419 F. Supp. 2d 1209 (C.D. Cal. 2006); Barri v. Workers' Comp. Appeals Bd., 28 Cal. App. 5th 428, 239 Cal. Rptr. 3d 180 (4th Dist. 2018); State v. Todd, 299 Kan. 263, 323 P.3d 829 (2014); State v. Patterson, 285 So. 3d 1154 (La. Ct. App. 1st Cir. 2019); State v. Hester, 449 N.J. Super. 314, 157 A.3d 865 (App. Div. 2017), judgment aff'd, 233 N.J. 381, 186 A.3d 236 (2018).

As to legislation affecting defenses, see § 703.

7 Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

8 Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

The proper Ex Post Facto Clause inquiry is not whether the law results in disadvantage to a person affected by it but rather whether it increases the penalty by which a crime is punished. People v. Fioretti, 54 Cal. App. 4th 1209, 63 Cal. Rptr. 2d 367 (6th Dist. 1997).

9 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); United States v. Wass, 2020 WL 1443526 (4th Cir. 2020); People v. Chilelli, 225 Cal. App. 4th 581, 170 Cal. Rptr. 3d 395 (2d Dist. 2014); People v. Pepitone, 2019 IL App (2d) 151161, 432 Ill. Dec. 55, 128 N.E.3d 1219 (App. Ct. 2d Dist. 2019), appeal denied, 433 Ill. Dec. 493, 132 N.E.3d 331 (Ill. 2019); Roberio v. Massachusetts Parole Board, 483 Mass. 429, 133 N.E.3d 792 (2019).

10 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); People v. Superior Court (Myers), 50 Cal. App. 4th 826, 58 Cal. Rptr. 2d 32 (2d Dist. 1996); Riley v. Parole Bd., 216 Mich. App. 242, 548 N.W.2d 686 (1996); Com. v. Rose, 633 Pa. 659, 127 A.3d 794 (2015).

Separation of powers, generally, see §§ 234 to 245.

11 Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); United States v. Kruger, 838 F.3d 786 (6th Cir. 2016); U.S. v. Lawrance, 548 F.3d 1329 (10th Cir. 2008); Bhalerao v. Illinois Dept. of Financial and Professional Regulations, 834 F. Supp. 2d 775 (N.D. Ill. 2011); United States v. Johnson, 145 F. Supp. 3d 862 (D.S.D. 2015); In re K.J., 224 Cal. App. 4th 1194, 169 Cal. Rptr. 3d 484 (1st Dist. 2014); State v. Meredith, 306 Kan. 906, 399 P.3d 859 (2017), cert. denied, 138 S. Ct. 2674, 201 L. Ed. 2d 1077 (2018); Jones v. State, 883 N.W.2d 596 (Minn. 2016); State v. Hester, 233 N.J. 381, 186 A.3d 236 (2018); Commonwealth v. Muniz, 640 Pa. 699, 164 A.3d 1189 (2017), cert. denied, 138 S. Ct. 925, 200 L. Ed. 2d 213 (2018).

A statute violates the Ex Post Facto Clauses in the State and Federal Constitutions only if it is (1) retroactive, and (2) more onerous than the law in effect on the date of the offense. Breton v. Commissioner of Correction, 330 Conn. 462, 196 A.3d 789 (2018); State v. Patterson, 285 So. 3d 1154 (La. Ct. App. 1st Cir. 2019).

12 People v. Tucker, 312 Mich. App. 645, 879 N.W.2d 906 (2015), appeal granted, 501 Mich. 1077, 911 N.W.2d 466 (2018), order vacated on other grounds, 503 Mich. 854, 916 N.W.2d 487 (2018) and appeal dismissed, 503 Mich. 854, 916 N.W.2d 487 (2018).

The Ex post facto Clause of the constitution prohibits retroactive application of laws that impose new or more serious penalties than existed at the time of the offense. Nezirovic v. Holt, 990 F. Supp. 2d 606 (W.D. Va. 2014), aff'd, 779 F.3d 233 (4th Cir. 2015).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

a. In General

(1) General Considerations

§ 687. Ex post facto laws distinguished from retrospective or retroactive laws

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2785

Ex post facto laws and retrospective or retroactive laws are easily distinguished; every ex post facto law must necessarily be retrospective,[1] but not every retrospective law is an ex post facto law.[2]

Footnotes

1 Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); U.S. v. Armstead, 114 F.3d 504 (5th Cir. 1997); Cooper v. Gammon, 943 S.W.2d 699 (Mo. Ct. App. W.D. 1997).

2 Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); U.S. v. Armstead, 114 F.3d 504 (5th Cir. 1997); Solomon v. U.S., 120 A.3d 618 (D.C. 2015); Cooper v. Gammon, 943 S.W.2d 699 (Mo. Ct. App. W.D. 1997).
Retrospective laws, generally, see §§ 731 to 746.

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

a. In General

(2) Limitation of Prohibition to Legislation Relating to Crimes and Penalties

§ 688. Limitation of prohibition against ex post facto laws to legislation relating to crimes and penalties, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2789 to 2793

The Ex Post Facto Clause[1] of the United States Constitution prohibits the retroactive application of penal legislation,[2] and the phrase "ex post facto" is said to be one which relates exclusively to criminal or penal statutes.[3] Only retroactive criminal punishment for past acts is prohibited, and civil disabilities and sanctions may apply retroactively without violating the Ex Post Facto Clause.[4] In evaluating ex post facto claims under the state constitution, the court applies what is commonly referred to as the "intent-effects" test:[5] the court must first determine whether the legislature meant the statute to establish civil proceedings, and if the intention of the legislature was to impose punishment, then that ends the inquiry because punishment results; if, however the court concludes the legislature intended a nonpunitive regulatory scheme, then the court must further examine whether the statutory scheme is so punitive, either in purpose or in effect, as to negate that intention thereby transforming what was intended as a civil regulatory scheme into a criminal penalty.[6] A statute's rational connection to a nonpunitive purpose is a most significant factor in a determination whether the statute's effects are not punitive for ex post facto purposes.[7] However, the mere presence of a deterrent purpose is insufficient to render a sanction criminal for ex post facto purposes, as deterrence may serve civil as well as criminal goals.[8]

In determining whether a particular sanction is criminal or civil, for ex post facto purposes, the court is to ascertain the legislature's intent and then determine the effect of the statute under the following seven factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment, i.e., retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[9] When analyzing the factors, no one factor is determinative, and a court's task is not simply to count the factors on each side, but to weigh them.[10] However, the seventh factor, which is whether the statute appears excessive in relation to the alternative purpose assigned, is weighed most heavily.[11]

Since commitment of persons acquitted of a crime by reason of insanity is imposed, not as punishment, but for the protection of society and of the individual confined, a law so providing is not ex post facto as applied to a case in which the act charged as a crime was committed before the commitment statute was passed.[12]

Footnotes

1 U.S. Const. Art. I, § 9, cl. 3.

2 Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

3 Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997); Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); Grice v. Colvin, 97 F. Supp. 3d 684 (D. Md. 2015); Underwood v. State, 519 S.W.3d 861 (Mo. Ct. App. W.D. 2017); Acevedo v. New York State Dept. of Motor Vehicles, 29 N.Y.3d 202, 54 N.Y.S.3d 614, 77 N.E.3d 331 (2017) (penal statutes).

Federal and state constitutional prohibition on ex post facto laws applies only to laws that are punitive. People v. Ruback, 2013 IL App (3d) 110256, 370 Ill. Dec. 547, 988 N.E.2d 745 (App. Ct. 3d Dist. 2013).

4 Shepard v. Houston, 289 Neb. 399, 855 N.W.2d 559 (2014).

Other retrospective laws, generally, see §§ 731 to 746.

If a law is regulatory or civil in nature, it cannot be an ex post facto law. Ray v. State, 2017 Ark. App. 574, 533 S.W.3d 587 (2017).

The revocation of the privilege of operating a motor vehicle—and by extension, the denial of the privilege of relicensing—is essentially civil in nature, and thus, the ex post facto prohibition does not apply. Acevedo v. New York State Dept. of Motor Vehicles, 29 N.Y.3d 202, 54 N.Y.S.3d 614, 77 N.E.3d 331 (2017).

5 Does #1-7 v. Abbott, 345 F. Supp. 3d 763 (N.D. Tex. 2018), aff'd, 945 F.3d 307 (5th Cir. 2019); State v. Kirby, 120 N.E.3d 574 (Ind. Ct. App. 2019), transfer denied, 129 N.E.3d 775 (Ind. 2019).

6 United States v. Wass, 2020 WL 1443526 (4th Cir. 2020); U.S. v. Lawrance, 548 F.3d 1329 (10th Cir. 2008); State v. Kirby, 120 N.E.3d 574 (Ind. Ct. App. 2019), transfer denied, 129 N.E.3d 775 (Ind. 2019); Devine v. Annucci, 150 A.D.3d 1104, 56 N.Y.S.3d 149 (2d Dep't 2017).

Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. Devine v. Annucci, 150 A.D.3d 1104, 56 N.Y.S.3d 149 (2d Dep't 2017).

To determine whether the intent of a state legislature in enacting a regulatory scheme was to impose punishment, such that the scheme could be subject to an ex post facto challenge, the court is to consider the statute's text and structure, as well as the other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes. Sanders v. Allison Engine Co., Inc., 703 F.3d 930 (6th Cir. 2012); McGuire v. Strange, 83 F. Supp. 3d 1231 (M.D. Ala. 2015).

7 Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); McGuire v. Strange, 83 F. Supp. 3d 1231 (M.D. Ala. 2015); State v. Bare, 197 N.C. App. 461, 677 S.E.2d 518 (2009).

8 Lescher v. Florida Dept. of Highway Safety and Motor Vehicles, 985 So. 2d 1078 (Fla. 2008).

9 Doe v. City of Palm Bay, 169 So. 3d 1211 (Fla. 5th DCA 2015); State v. Aschbrenner, 926 N.W.2d 240 (Iowa 2019); Yepa v. State Taxation and Revenue Dept., 2015-NMCA-099, 358 P.3d 268 (N.M. Ct. App. 2015);

Williams v. Department of Corrections and Community Supervision, 43 Misc. 3d 356, 979 N.Y.S.2d 489 (Sup 2014), judgment aff'd, 136 A.D.3d 147, 24 N.Y.S.3d 18 (1st Dep't 2016); Commonwealth v. Moore, 2019 PA Super 320, 222 A.3d 16 (2019); State v. Williams, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373 (2018).

While also considering these factors, Texas courts add the following: whether the statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, whether the statutory change touches any vested rights, whether the change to the statute was procedural or substantive. Collins v. State, 516 S.W.3d 504 (Tex. App. Beaumont 2017).

The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes in context of an ex post facto claim; if a sanction is not linked to a showing of mens rea, it is less likely to be intended as punishment. State v. Kirby, 120 N.E.3d 574 (Ind. Ct. App. 2019), transfer denied, 129 N.E.3d 775 (Ind. 2019).

10 State v. Kirby, 120 N.E.3d 574 (Ind. Ct. App. 2019), transfer denied, 129 N.E.3d 775 (Ind. 2019).

11 State v. Kirby, 120 N.E.3d 574 (Ind. Ct. App. 2019), transfer denied, 129 N.E.3d 775 (Ind. 2019).

12 People v. Superior Court (Myers), 50 Cal. App. 4th 826, 58 Cal. Rptr. 2d 32 (2d Dist. 1996); Warren v. Commissioner of Mental Health, 43 Conn. App. 592, 685 A.2d 332 (1996); State v. Smith, 198 W. Va. 702, 482 S.E.2d 687 (1996).

As to ex post facto principles as applied to commitment of sex offenders, generally, see § 700.

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

a. In General

(2) Limitation of Prohibition to Legislation Relating to Crimes and Penalties

§ 689. Applicability of ex post facto doctrine to judicial decisions or court rules

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2788(4)

A.L.R. Library

Comment Note.—Prospective or retroactive operation of overruling decision, 10 A.L.R.3d 1371

Generally, the Ex Post Facto Clause is a limitation upon the powers of the legislature and does not of its own force apply to the judicial branch of government.[1] Although the Ex Post Facto Clause in the United States Constitution does not apply to the courts or their decisions, an unforeseeable judicial construction of a criminal statute, applied retroactively, can function like an ex post facto law and violate the Due Process Clause.[2] An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law,[3] and since a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.[4] Due process concerns require that the application of judicial decisions to a pending defendant's case complies with the concepts of notice, foreseeability, and in particular the right to fair warning.[5] However, some

courts now hold that the state and federal ex post facto prohibition barring statutes that increase the punishment for unlawful acts after they were committed applies equally to judicial decisions, whose effect is also to increase punishment for criminal conduct after its commission[6] although the Ex Post Facto Clauses of the State or Federal Constitutions are generally held inapplicable to mere changes in court rules[7] or attorney discipline rules.[8]

Footnotes

1 U.S. v. Marcus, 560 U.S. 258, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010); Rogers v. Tennessee, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001); Marshall v. Bristol Superior Court, 753 F.3d 10 (1st Cir. 2014); Lininger v. Welch, 465 Fed. Appx. 411 (6th Cir. 2012); Cimmino v. Marcoccia, 332 Conn. 510, 211 A.3d 1013 (2019); Caton v. State, 291 Neb. 939, 869 N.W.2d 911 (2015); State v. Adams, 144 Ohio St. 3d 429, 2015-Ohio-3954, 45 N.E.3d 127 (2015); State v. Worth, 300 Or. App. 138, 452 P.3d 1041 (2019); State v. Plastow, 2015 SD 100, 873 N.W.2d 222 (S.D. 2015).

2 United States v. Burris, 920 F.3d 942 (5th Cir. 2019); United States v. Dunlap, 936 F.3d 821 (8th Cir. 2019); State v. Worth, 300 Or. App. 138, 452 P.3d 1041 (2019); Harber v. State, 594 S.W.3d 438 (Tex. App. San Antonio 2019), petition for discretionary review refused, (Jan. 15, 2020).
Due process, generally, see §§ 933 to 1017.

3 Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); People v. White, 2 Cal. 5th 349, 212 Cal. Rptr. 3d 376, 386 P.3d 1172 (Cal. 2017).

4 Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); Lopez v. State, 928 S.W.2d 528 (Tex. Crim. App. 1996).

5 Hooks v. Sheets, 603 F.3d 316 (6th Cir. 2010); U.S. v. Wade, 435 F.3d 829 (8th Cir. 2006).

6 People v. Farley, 45 Cal. App. 4th 1697, 53 Cal. Rptr. 2d 702 (6th Dist. 1996); People v. Granados, 172 Ill. 2d 358, 217 Ill. Dec. 253, 666 N.E.2d 1191 (1996).
The ex post facto prohibition will preclude retroactive application of those decisions implicating notice, foreseeability, and the right to fair warning-that is, those decisions that were unexpected and are indefensible by reference to the law previously expressed. People v. Odom, 327 Mich. App. 297, 933 N.W.2d 719 (2019).
Judicial interpretation of a criminal statute may not be applied retroactively, under ex post facto and due process principles, if the court's decision is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. Williams v. Filson, 908 F.3d 546 (9th Cir. 2018).

7 Dowd and Dowd, Ltd. v. Gleason, 284 Ill. App. 3d 915, 220 Ill. Dec. 37, 672 N.E.2d 854 (1st Dist. 1996), judgment aff'd in part, rev'd in part on other grounds, 181 Ill. 2d 460, 230 Ill. Dec. 229, 693 N.E.2d 358 (1998).

8 In re Aubuchon, 233 Ariz. 62, 309 P.3d 886 (2013), as amended, (Oct. 25, 2013).

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16B Am. Jur. 2d Constitutional Law § 690

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

a. In General

(2) Limitation of Prohibition to Legislation Relating to Crimes and Penalties

§ 690. Amendment, repeal, or reenactment of statute effecting alteration in law as ex post facto law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2791 to 2793

Procedural laws can be applied retrospectively without violating a state constitution's prohibition against ex post facto laws, while substantive laws cannot.[1] Laws which do not amend substantive law by defining criminal acts or providing for penalties are procedural in nature, and are not usually within the ex post facto prohibition.[2] Legal changes must be substantive, rather than procedural, to give rise to an Ex Post Facto Clause violation.[3] Moreover, if a procedural change to a law is retroactive and results in a deprivation of a substantive protection, it is unconstitutional as a violation of prohibition against ex post facto laws.[4] An amendment that clarifies a statute does not violate the Ex Post Facto Clause.[5] If an act is criminal and punishable when committed and a statute is subsequently enacted also making it criminal and punishable, but giving the crime a designation not before given to it, the situation of the accused is not altered to his or her disadvantage and, accordingly, such statute is not an ex post facto law and when the same offense is defined in the same way by both the earlier and the later statute, the courts refuse to recognize that there is any interval in which there was no law defining the offense.[6]

On the other hand where a change in a penal statute is made after the commission of an offense and before trial, by means of which the crime is so defined as to make criminal something which was before lawful, it has been held that the offender cannot be punished under either statute.[7]

Footnotes

1 State v. Kleine, 330 S.W.3d 805 (Mo. Ct. App. S.D. 2011).

2 In re Hall, 433 S.W.3d 203 (Tex. App. Houston 14th Dist. 2014).

3 Smith v. Ryan, 823 F.3d 1270 (9th Cir. 2016).

4 In re Hall, 433 S.W.3d 203 (Tex. App. Houston 14th Dist. 2014).
A law is not procedural if it affects substantive rights, and a law violates the ex post facto clauses only if it affects substantive rights. Roberio v. Massachusetts Parole Board, 483 Mass. 429, 133 N.E.3d 792 (2019).

5 Resto-Diaz v. U.S., 182 F. Supp. 2d 197 (D.P.R. 2002).

6 U.S. v. Powers, 307 U.S. 214, 59 S. Ct. 805, 83 L. Ed. 1245 (1939); U.S. v. Vaccaro, 115 F.3d 1211 (5th Cir. 1997); People v. Cortez, 286 Ill. App. 3d 478, 221 Ill. Dec. 674, 676 N.E.2d 195 (1st Dist. 1996).

7 Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996); Kitze v. Commonwealth, 23 Va. App. 213, 475 S.E.2d 830 (1996).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(1) Legislation Affecting Punishment; Initiation of Punishment for Previously Innocent Conduct

§ 691. Legislation affecting punishment as violating ex post facto principles, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2790, 2800, 2802, 2810

A statute is prohibited as ex post facto if it punishes as a crime an act previously committed, which was innocent when done.[1] In other words, the Ex Post Facto Clause prohibits punishment of a defendant for an act which was not punishable at the time it was committed.[2]

Enactments which allegedly operate to prevent a person from practicing his or her chosen calling have been held not to fall within the definition of an ex post facto law for purposes of the Federal Constitution in some cases.[3] Under the Ex Post Facto Clause, a state may outlaw a formerly legal business even if it causes hardship to those who relied on the earlier law.[4] City ordinances, which limit the hours and location of sexually oriented businesses, are not ex post facto laws where they do not punish action taken prior to passage of the ordinances, but rather restrict or penalize action taken after passage.[5]

Footnotes

1 Sweeney v. Pence, 767 F.3d 654 (7th Cir. 2014); People v. Cawkwell, 34 Cal. App. 5th 1048, 246 Cal. Rptr. 3d 744 (4th Dist. 2019), review granted, see cal. rules of court 8.1105 and 8.1115, 250 Cal. Rptr. 3d 720,

446 P.3d 234 (Cal. 2019); Gaither v. Commonwealth, 521 S.W.3d 199 (Ky. 2017); State v. Jenkins, 303 Neb. 676, 931 N.W.2d 851 (2019); Devine v. Annucci, 150 A.D.3d 1104, 56 N.Y.S.3d 149 (2d Dep't 2017); Matter of A.J.F., 588 S.W.3d 322 (Tex. App. Houston 14th Dist. 2019).

2 United States v. Wass, 2020 WL 1443526 (4th Cir. 2020); Hill v. Snyder, 878 F.3d 193 (6th Cir. 2017); Healey v. State, 969 N.E.2d 607 (Ind. Ct. App. 2012); Com. v. Rose, 633 Pa. 659, 127 A.3d 794 (2015).

3 Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961); In re Brown, 157 W. Va. 1, 197 S.E.2d 814 (1973).

4 Santa Barbara Patients' Collective Health Co-op. v. City of Santa Barbara, 911 F. Supp. 2d 884 (C.D. Cal. 2012).

5 Cricket Store 17, LLC v. City of Columbia, 996 F. Supp. 2d 422 (D.S.C. 2014), appeal dismissed and appeal dismissed.

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(1) Legislation Affecting Punishment; Initiation of Punishment for Previously Innocent Conduct

§ 692. Application of Ex Post Facto Clause to aggravating degree of crime resulting from act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2790, 2803

As a general proposition, legislation which aggravates the degree of the crime resulting from an act committed prior to its passage violates the constitutional prohibition against ex post facto laws.[1] Thus, a law is ex post facto if it increases the severity of a crime after it has been committed.[2]

Footnotes

1 Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); Dibble v. Klee, 373 F. Supp. 3d 846 (E.D. Mich. 2019); Gaither v. Commonwealth, 521 S.W.3d 199 (Ky. 2017); State v. Jenkins, 303 Neb. 676, 931 N.W.2d 851 (2019); Matter of A.J.F., 588 S.W.3d 322 (Tex. App. Houston 14th Dist. 2019).

2 Mason v. State, 2018 OK CR 37, 433 P.3d 1264 (Okla. Crim. App. 2018).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(1) Legislation Affecting Punishment; Initiation of Punishment for Previously Innocent Conduct

§ 693. Application of Ex Post Facto Clause to continuing offenses; multiple offenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2789, 2790, 2800, 2802

Conviction for a continuing offense straddling enactment of a statute will not run afoul of the Ex Post Facto Clause[1] unless it was possible for a jury to convict based exclusively on the preenactment conduct.[2] Indeed, a continuous course of conduct offense cannot logically be "completed" until the last requisite act is performed, and thus where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without violating the ex post facto prohibition.[3] Where the conduct is a continuing offense spanning a period before and after a Sentencing Guidelines Manual revision, the later Manual applies without violating the Ex Post Facto Clause.[4] Indeed, there is no ex post facto violation when a court groups continuing, related conduct and applies the Sentencing Guidelines Manual in effect during the latest-concluded conduct.[5] With continuing offenses, such as conspiracies, ex post facto concerns are not present because, by agreeing to engage in a conspiracy, a defendant becomes culpable for all subsequent acts committed during the course of the conspiracy.[6] Moreover, a law defining a continuing offense does not implicate ex post facto considerations because the law does not change the legal consequences of acts completed before its effective date, but operates solely with respect to subsequent conduct.[7] A law is not an ex post facto law merely because it punishes a continuing offense which was not punishable when first committed but which has continued after enactment of a statute making such continuing conduct unlawful.[8] The doctrine of continuing offenses should be applied only in limited circumstances.[9]

Footnotes

1 People v. Chilelli, 225 Cal. App. 4th 581, 170 Cal. Rptr. 3d 395 (2d Dist. 2014).

2 U.S. v. Marcus, 628 F.3d 36 (2d Cir. 2010).

3 People v. Valenti, 243 Cal. App. 4th 1140, 197 Cal. Rptr. 3d 317 (2d Dist. 2016).

4 U.S. v. Josephberg, 562 F.3d 478 (2d Cir. 2009); United States v. Wijegoonaratna, 922 F.3d 983 (9th Cir. 2019).
As to the federal sentencing guidelines, generally, see § 701.

5 U.S. v. Siddons, 660 F.3d 699 (3d Cir. 2011).

6 United States v. Johnson, 145 F. Supp. 3d 862 (D.S.D. 2015).

7 Wright v. Superior Court, 15 Cal. 4th 521, 63 Cal. Rptr. 2d 322, 936 P.2d 101 (1997).

8 U.S. v. Blumeyer, 114 F.3d 758 (8th Cir. 1997).

9 United States v. Johnson, 145 F. Supp. 3d 862 (D.S.D. 2015) (applied to a sentencing provision).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 694. Application of Ex Post Facto Clause to legislation increasing punishment, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2789, 2790, 2814 to 2816

The Supreme Court and other federal and state courts have held that one class of invalid ex post facto laws consists of statutes which retroactively impose a punishment in addition to or greater than that prescribed by the previous law[1] or makes more burdensome[2] or which increases the punishment.[3]

Observation:

Critical to relief under the Ex Post Facto Clause is the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.[4]

When a sentencing or disposition statute merely regulates the imposition of a sentence without increasing the level of punishment, a trial court may constitutionally apply the statute effective at the time of disposition, though it was not yet effective at the time of the offense.[5]

Footnotes

1 Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997); California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); U.S. v. Kurtz, 819 F.3d 1230 (10th Cir. 2016); Dibble v. Klee, 373 F. Supp. 3d 846 (E.D. Mich. 2019); Gaither v. Commonwealth, 521 S.W.3d 199 (Ky. 2017); State v. Jenkins, 303 Neb. 676, 931 N.W.2d 851 (2019); Matter of A.J.F., 588 S.W.3d 322 (Tex. App. Houston 14th Dist. 2019).

When a court engages in an ex post facto analysis, its focus is whether the statute assigns more severe criminal or penal consequences to an act than did the law in place when the act occurred, and it is irrelevant whether the statutory change touches any vested rights. Young v. State, 358 S.W.3d 790 (Tex. App. Houston 14th Dist. 2012), petition for discretionary review refused, (June 13, 2012).

2 United States v. Hearns, 845 F.3d 641 (5th Cir. 2017); Brigance v. State, 2018 Ark. App. 213, 548 S.W.3d 147 (2018); Barri v. Workers' Comp. Appeals Bd., 28 Cal. App. 5th 428, 239 Cal. Rptr. 3d 180 (4th Dist. 2018); State v. Lopez, 907 N.W.2d 112 (Iowa 2018); State v. Patterson, 285 So. 3d 1154 (La. Ct. App. 1st Cir. 2019).

3 Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937); Johnson v. Madigan, 880 F.3d 371 (7th Cir. 2018); Bailey v. Fulwood, 793 F.3d 127 (D.C. Cir. 2015); United States v. Rubenstein, 228 F. Supp. 3d 223 (E.D. N.Y. 2017), appeal dismissed, 2019 WL 1992626 (2d Cir. 2019); State v. Hester, 233 N.J. 381, 186 A.3d 236 (2018).

4 Gonzalez-Fuentes v. Molina, 607 F.3d 864 (1st Cir. 2010); State v. Patterson, 285 So. 3d 1154 (La. Ct. App. 1st Cir. 2019); Commonwealth v. Muniz, 640 Pa. 699, 164 A.3d 1189 (2017), cert. denied, 138 S. Ct. 925, 200 L. Ed. 2d 213 (2018).

5 Matter of Appeal in Maricopa County Juvenile Action Numbers JV-512600 and JV-512797, 187 Ariz. 419, 930 P.2d 496 (Ct. App. Div. 1 1996).

16B Am. Jur. 2d Constitutional Law § 695

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Constitutional Law
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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 695. Test for determining applicability of Ex Post Facto Clause to increases in punishment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2789, 2790, 2814 to 2816

Mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the Ex Post Facto Clause.[1] Rather, the touchstone of the Supreme Court's inquiry into whether a sentencing law violates the Ex Post Facto Clause is whether a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes; the question when a change in law creates such a risk is a matter of degree, and the test cannot be reduced to a single formula.[2] A law that creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes does not present a sufficient risk, and will not be deemed to be an ex post facto law.[3] It is the defendant who must demonstrate that application of the new law creates a sufficient risk of increasing the measure of punishment attached to the covered crimes.[4] Moreover, in determining whether legislation increases the punishment for a prior offense in violation of the Ex Post Facto Clause, the key question is whether the new law makes it possible for the accused to receive a greater punishment, even though it is also possible for him or her to receive the same punishment under the new law as could have been imposed under prior law.[5] Thus, the Ex Post Facto Clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed as the true test of a state's ex post facto nature, and an increase in the possible penalty may be a violation of the clause regardless of the length of the sentence actually imposed.[6] Moreover, the law need not increase the maximum sentence for which a defendant is eligible in order to violate the Ex Post Facto Clause.[7] However, it has also been held that in order to prevail on an ex post facto challenge,

a petitioner must definitively show that the change in law resulted in a harsher sentence; speculative assertions do not satisfy the petitioner's burden.[8] Additionally, when an allegedly ex post facto law does not by its own terms show a significant risk of increasing the punishment attached to the covered crimes, the claimant must demonstrate, by evidence drawn from the law's practical implementation, that its retroactive application will result in a longer period of incarceration than under the earlier law.[9]

CUMULATIVE SUPPLEMENT

Cases:

For a retroactive statute to produce a sufficient risk of increasing the measure of punishment attached to a crime, so as to violate ex post facto clause, the new law must have a direct effect on the sentence length, as opposed to being a procedural change that may indirectly affect the sentence length. U.S. Const. art. 1, § 10, cl. 1; Miss. Const. art. 3, § 16. Blue v. State, 303 So. 3d 714 (Miss. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013); United States v. Kruger, 838 F.3d 786 (6th Cir. 2016).

2 Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013); United States v. Kruger, 838 F.3d 786 (6th Cir. 2016); United States v. Alvaran-Velez, 914 F.3d 665 (D.C. Cir. 2019); Alli-Balogun v. U.S., 114 F. Supp. 3d 4 (E.D. N.Y. 2015); Breton v. Commissioner of Correction, 330 Conn. 462, 196 A.3d 789 (2018).

3 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); United States v. Kruger, 838 F.3d 786 (6th Cir. 2016); United States v. Alvaran-Velez, 914 F.3d 665 (D.C. Cir. 2019).

4 Gray v. State, 13 So. 3d 283 (Miss. Ct. App. 2008); State v. Rondeau, 203 Vt. 518, 2016 VT 117, 159 A.3d 1073 (2016).

5 Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).

6 Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937); Stinson v. State, 208 Tenn. 159, 344 S.W.2d 369 (1961).

7 Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

8 In re Personal Restraint of Dyer, 164 Wash. 2d 274, 189 P.3d 759 (2008).

9 Gray v. State, 13 So. 3d 283 (Miss. Ct. App. 2008).

16B Am. Jur. 2d Constitutional Law § 696

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 696. Application of Ex Post Facto Clause to capital punishment cases

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2805, 2815

A.L.R. Library

Timeliness of Challenge, Under 42 U.S.C.A. s1983, to Constitutionality of State Executions by Lethal Injection, 22 A.L.R.6th 19

Substantive Challenges to Propriety of Execution by Lethal Injection in State Capital Proceedings, 21 A.L.R.6th 1

Where the sentence was death, and that sentence remains in place, a change in the method of execution, resulting from a new lethal injection statute[1] or regulation[2] does not make the sentence more burdensome, nor does it creates a significant risk of increased punishment in the form of agony, degradation, serious injury, and/or lingering death,[3] and so such change does not violate the Ex Post Facto Clause. Also, a state does not violate a petitioner's rights under the Ex Post Facto Clause by changing the place and procedures applicable to his or her execution.[4] However, laws imposing or reestablishing the death penalty, where no such penalty existed at the time a particular crime was committed, clearly do violate the Ex Post Facto Clauses.[5]

In a capital murder case the court's use, as an aggravating factor, of convictions that predate the passage of the statute under which the death penalty is being pursued, does not violate the Ex Post Facto Clause because the consideration of those prior crimes neither exposes the defendant to conviction for criminal conduct of which he was not given fair notice, nor subjects the defendant to further punishment for earlier crimes.[6]

Footnotes

1 Hobbs v. McGehee, 2015 Ark. 116, 458 S.W.3d 707 (2015).

2 Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (where the defendant is given a choice of the method of execution).

3 Hobbs v. McGehee, 2015 Ark. 116, 458 S.W.3d 707 (2015).
For purposes of the Ex Post Facto Clause, the method of execution does not bear upon the sentence of death itself. State v. Torres, 283 Neb. 142, 812 N.W.2d 213 (2012).

4 McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995), opinion adopted on reh'g en banc on other grounds, 57 F.3d 1493 (9th Cir. 1995).

5 White v. Brown, 468 F.2d 301 (9th Cir. 1972); People v. Milan, 9 Cal. 3d 185, 107 Cal. Rptr. 68, 507 P.2d 956 (1973).

6 Com. v. Rega, 620 Pa. 640, 70 A.3d 777 (2013).

16B Am. Jur. 2d Constitutional Law § 697

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 697. Application of Ex Post Facto Clause to changes to terms, methods, and conditions of confinement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2815, 2816, 2818

A.L.R. Library

Validity, Construction, and Application of State Controlled Substances Offender Registry Acts, 2 A.L.R.7th Art. 4

Generally speaking, most legislative changes which have been challenged as allegedly adding to the punishment for a prior offense have been held not violative of the ex post facto prohibition and these changes have included those—

— applying a new interpretation of a statute to the limit time that a prisoner could spend in community confinement centers.[1]

— removing a prisoner from a work-release program and reinstating confinement.[2]

— allowing the transfer of prisoners to another prison.[3]

— changing the rules for awarding "good time" allowances in prison[4] although there is authority to the contrary.[5]

— subjecting certain prisoners to AIDS testing.[6]

— requiring prisoners to make a copayment to receive medical care.[7]

— requiring prisoners to pay a monthly fee for administration of their trust accounts.[8]

— authorizing a court facilities assessment to crimes committed before the statute's effective date where the statute's history and substance demonstrate that it is not a penal statute, in terms or effect.[9]

— requiring an inmate to reimburse the state for the cost of their incarceration.[10]

— imposing deportation.[11]

In short, the Supreme Court has said that the Ex Post Facto Clause does not forbid all legislative changes that have any conceivable risk of affecting a prisoner's punishment.[12] Prison officials also have the ability to change institutional rules without violating the prohibition against ex post facto laws.[13] Nonetheless, the prohibition against ex post facto laws applies to restitution fines.[14] Also, a statute requiring inmates convicted of a felony sex offense or other specified offense to submit a DNA sample before being discharged from confinement is punitive for ex post facto purposes in mandating forfeiture of all good time and thereby increasing the period of a defendant's incarceration.[15] Additionally, the Ex Post Facto Clause precluded cancellation of a probationer's overcrowding gain time pursuant to a Safe Streets Initiative where the probationer had already been released on probation by the time the Safe Streets Initiative was enacted.[16]

Footnotes

1 Loeffler v. Menifee, 326 F. Supp. 2d 454 (S.D. N.Y. 2004).
Inmates' rights and conditions of incarceration, generally, see Am. Jur. 2d, Penal and Correctional Institutions §§ 22 to 105.

2 Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996); McCormack v. Posillico, 213 A.D.2d 913, 624 N.Y.S.2d 304 (3d Dep't 1995).

3 Westefer v. Snyder, 422 F.3d 570 (7th Cir. 2005).

4 Hill v. Snyder, 900 F.3d 260 (6th Cir. 2018); State ex rel. Square v. State, 206 So. 3d 872 (La. 2017).

5 Price v. Warden, 785 F.3d 1039 (5th Cir. 2015) (holding that a good-time forfeiture law enacted after a prisoner's sentencing is retrospective even if forfeiture is triggered by the parolee's postenactment conduct); State v. Iowa Dist. Court for Jones County, 763 N.W.2d 586 (Iowa 2009).

6 People v. Adames, 54 Cal. App. 4th 198, 62 Cal. Rptr. 2d 631 (2d Dist. 1997).
Mandatory HIV testing of sex offenders does not violate the ex post facto prohibition. People v. J.G., 171 Misc. 2d 440, 655 N.Y.S.2d 783 (Sup 1996).

7 Mourning v. Correctional Medical Services, (CMS) of St. Louis, Mo., 300 N.J. Super. 213, 692 A.2d 529 (App. Div. 1997).

8 Roark v. Graves, 262 Kan. 194, 936 P.2d 245 (1997) (such a fee is not an ex post facto law; it is simply a reasonable charge for services rendered).

9 People v. Davis, 185 Cal. App. 4th 998, 112 Cal. Rptr. 3d 70 (2d Dist. 2010).
A $4 records and automation fee, imposed as part of sentence for attempted first-degree murder and aggravated battery with firearm, are not "fines" designed to punish defendant for his crimes, and thus, do

not implicate the prohibition against ex post facto laws. People v. Taylor, 2016 IL App (1st) 141251, 408 Ill. Dec. 292, 65 N.E.3d 514 (App. Ct. 1st Dist. 2016).

10 Department of Corrections ex rel. People of State of Ill. v. Adams, 278 Ill. App. 3d 803, 215 Ill. Dec. 631, 663 N.E.2d 1145 (4th Dist. 1996).

11 Lawrence v. Gonzales, 446 F.3d 221 (1st Cir. 2006); Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2004).

12 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).

13 State v. Iowa Dist. Court for Henry County, 759 N.W.2d 793 (Iowa 2009).

14 People v. Valenzuela, 172 Cal. App. 4th 1246, 92 Cal. Rptr. 3d 13 (2d Dist. 2009).

15 Shepard v. Houston, 289 Neb. 399, 855 N.W.2d 559 (2014).

16 State v. Lancaster, 731 So. 2d 1227 (Fla. 1998).

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16B Am. Jur. 2d Constitutional Law § 698

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 698. Application of Ex Post Facto Clause to recidivist statutes, "three strikes" laws, enhanced punishment laws

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2803, 2815, 2816

Recidivist enhancement statutes do not change the penalty imposed for an earlier conviction but penalize only the last offense committed by the defendant.[1] In general, sentence enhancement statutes withstand constitutional attacks under the Ex Post Facto Clause because such statutes do not punish a defendant for his or her prior convictions but instead punish the defendant as a repeat offender for the latest offense on the basis of his or her demonstrated propensity for misconduct.[2] Indeed, the key to an inquiry as to whether the sentence imposed under a recidivist statute raises ex post facto concerns is the timing of the defendant's present offense, not the timing of the earlier offenses used as prior convictions for enhancement purposes.[3] Thus, the passage by Congress or a state legislature of recidivist statutes, so-called "three strikes" laws, or statutes that provide for enhanced punishment for multiple repeat offenses following the commission of an initial or subsequent criminal act but prior to the commission of the final criminal act subjecting a defendant to an enhanced sentence is generally held not to be a violation of the Ex Post Facto Clause.[4] Moreover, in some jurisdictions, since the issue in an analysis of the Ex Post Facto clause is whether the defendant had fair notice of the change in the law, the operative date for determining whether there was an ex post facto violation, and the date on which the defendant is deemed to have fair notice of a recidivist sentencing law, is the date the legislature adopted the statutory amendments, which occurred before the defendant committed his DUI offenses, not the date that the legislature made the amendments effective.[5]

For the purpose of analyzing ex post facto implications of repeat offender statutes and statutes increasing penalties for future crimes based on past crimes, the relevant offense is the current crime, not the predicate crime; a statute which prohibits specified future conduct and puts a defendant on notice of the consequences of his or her contemplated act does not become an ex post facto law simply because liability is based on a previous conviction.[6]

A statutory amendment pursuant to which prior offenses within a 10-year period rather than a former shorter period, caused enhanced punishment;[7] or an amendment pursuant to which all prior operating while intoxicated offenses caused enhanced punishment,[8] did not violate the constitutional provision against ex post facto laws.

The constitutional prohibition on ex post facto laws was not implicated by the application of a statute governing prior record level for felony sentencing, in calculating a prior record level of a defendant convicted of murder and burglary; the defendant's increased sentence due to a change in classification of his prior conviction for the drug offense served only to enhance his punishment for the present offenses of burglary and murder, and not to punish the defendant for his prior conviction.[9]

Footnotes

1 Nichols v. U.S., 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); United States v. Morgan, 255 F. Supp. 3d 221 (D.D.C. 2017); State v. Carrigan, 428 N.J. Super. 609, 55 A.3d 87 (App. Div. 2012).

2 Simmons v. State, 962 N.E.2d 86 (Ind. Ct. App. 2011); Martin v. Commonwealth, 64 Va. App. 666, 770 S.E.2d 795 (2015).
Recidivist statutes stiffen penalties for the latest crime; they do not increase the penalty for a prior offense within the meaning of Ex Post Facto Clauses. State v. Hester, 449 N.J. Super. 314, 157 A.3d 865 (App. Div. 2017), judgment aff'd, 233 N.J. 381, 186 A.3d 236 (2018).
When a defendant is given a higher sentence under a recidivism statute, 100% of the punishment is for the offense of conviction; none is for the prior convictions or the defendant's status as a recidivist. United States v. Morgan, 255 F. Supp. 3d 221 (D.D.C. 2017).

3 Moore v. Chrones, 687 F. Supp. 2d 1005 (C.D. Cal. 2010).

4 Moore v. Chrones, 687 F. Supp. 2d 1005 (C.D. Cal. 2010).

5 Commonwealth v. McGarry, 2017 PA Super 323, 172 A.3d 60 (2017), appeal denied, 646 Pa. 449, 185 A.3d 966 (2018).

6 State v. Grimes, 16 So. 3d 418 (La. Ct. App. 5th Cir. 2009), writ denied, 28 So. 3d 1023 (La. 2010).

7 State v. Lamb, 147 Idaho 133, 206 P.3d 497 (Ct. App. 2009); Commonwealth v. McGarry, 2017 PA Super 323, 172 A.3d 60 (2017), appeal denied, 646 Pa. 449, 185 A.3d 966 (2018).

8 People v. Perkins, 280 Mich. App. 244, 760 N.W.2d 669 (2008), decision aff'd, 482 Mich. 1118, 758 N.W.2d 280 (2008).

9 State v. Watkins, 195 N.C. App. 215, 672 S.E.2d 43 (2009).

16B Am. Jur. 2d Constitutional Law § 699

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 699. Sex offender legislation as violating Ex Post Facto Clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2820, 2821

A.L.R. Library

Validity, Construction and Application of State Sex Offender Registration Statutes Concerning Level of Classification—General Principles, Evidentiary Matters, and Assistance of Counsel, 64 A.L.R.6th 1 (secs. 44, 45 superseded in part by Adequacy of Defense Counsel's Representation Concerning Sex Offender Registration, 32 A.L.R.7th Art. 4)

Validity of State Sex Offender Registration Laws Under Equal Protection Guarantees, 93 A.L.R.6th 1

State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Constitutional Issues, 37 A.L.R.6th 55 (secs. 13, 14 superseded in part by Validity of State Sex Offender Registration Laws Under Equal Protection Guarantees, 93 A.L.R.6th 1)

Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions, 63 A.L.R.6th 351

Court's Duty to Advise Sex Offender as to Sex Offender Registration Consequences or Other Restrictions Arising from Plea of Guilty, or to Determine that Offender is Advised Thereof, 41 A.L.R.6th 141

State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Expungement, Stay or Deferral, Exceptions, Exemptions, and Waiver, 39 A.L.R.6th 577

State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Duty to Register, Requirements for Registration, and Procedural Matters, 38 A.L.R.6th 1

Validity, Construction, and Application of State Statutory Requirement that Person Convicted of Sexual Offense in Other Jurisdiction Register or Be Classified as Sexual Offender in Forum State, 34 A.L.R.6th 171

Validity, Construction, and Application of State Statutes Imposing Criminal Penalties for Failure to Register as Required Under Sex Offender or Other Criminal Registration Statutes, 33 A.L.R.6th 91

Validity, Construction, and Application of State Statute Including "Sexually Motivated Offenses" Within Definition of Sex Offense for Purposes of Sentencing or Classification of Defendant as Sex Offender, 30 A.L.R.6th 373

Validity, construction, and application of state statutes authorizing community notification of release of convicted sex offender, 78 A.L.R.5th 489

The constitutional prohibition against ex post facto laws does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, as long as the means of protection are reasonably designed for that purpose and only for that purpose and not designed to punish.[1]

Community notification requirements imposed on sex offenders who are being released from prison and who are moving to a particular community under provisions of federal and state statutes, which are frequently referred to as "Megan's laws," that require registration where the sex offender intends to live do not inflict retroactive "punishment" in violation of the Ex Post Facto Clause,[2] although there is some dissent from this view.[3] These laws are generally viewed as regulatory or civil in nature, not penal,[4] Such laws may also be made to apply to juvenile sex offenders.[5]

A useful analytical tool for determining whether community notification provisions of a "Megan's law" is punitive for purposes of ex post facto clauses is to consider the intent of the legislature, the practical effect of the legislation, the purpose of the statute, and analogous historical precedents.[6]

Practice Tip:

An action for declaratory judgment was a permissible remedy for a convicted sex offender's claim that the retroactive application of a statute prohibiting a "serious sex offender" from entering a school violated the prohibition against ex post facto laws, where the declaratory judgment statute was enacted for explicit purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations," and settling his uncertain legal status in light of the statutory school-entry restriction was precisely what the sex offender seeks to do.[7]

A state statute requiring certain persons convicted of serious child sex offenses to wear global positioning system tracking devices for the rest of their lives does not impose punishment, and thus does not violate the Ex Post Facto Clause because the purpose of the statute is to discourage such persons from recidivism by increasing the likelihood that, if they commit a sex offense, they will be arrested since the device would give the Department of Corrections incontestable evidence that the person was at the location of the offense at the relevant time.[8]

A sex offender law that imposes registration requirements for sex offenders does not constitute punishment or is regarded as nonpunitive for the purposes of a constitutional ex post facto analysis;[9] such statutes are civil statutes aimed at the prevention of crime and the protection of the public.[10] Additionally, prosecution of a defendant, a convicted sex offender, for failure to inform the police authorities of a change in residence does not violate the Ex Post Facto Clause, even though the statute which provides for the registration requirements was enacted after the defendant committed the original offense.[11] Residency and travel restrictions imposed by a state statute have been found to be not so punitive in their consequences as to transform residency restrictions into punishment, and thus the Ex Post Facto Clause does not apply to a defendant who cannot live with his girlfriend within a certain distance of a school.[12]

Some courts have held that the Ex Post Facto Clause prohibits the retroactive application of a state's Sex Offender Registration Act to persons who commit the offense[13] or are convicted[14] before the Act's passage because the law is considered punitive, or to constitute a greater punishment than was previously in effect. Other courts have held that the effects of an ordinance prohibiting registered sex offenders whose convictions involved a child under 18 years of age from knowingly entering or loitering near child safety zones were so punitive in nature as to constitute a criminal penalty as applied to a registered sex offender who could not go to the library with his child, entering his child's school, or go to city parks, and thus the ordinance violated the state constitution's ex post facto clause.[15] A state's SORNA is punitive in effect and thus violates the Ex Post Facto Clause of the Federal Constitution despite its expressed civil remedial purpose where the court finds that it involves affirmative disabilities or restraints, its sanctions are historically regarded as punishment, its operation promotes the traditional aims of punishment, including deterrence and retribution, and its registration requirements are excessive in relation to its stated nonpunitive purpose.[16] While the Sex Offender Registration and Notification Act,[17] by authorizing imprisonment, has been held to be punitive, the punishment, with respect to offenders who were convicted of a sex offense before SORNA's enactment, is for post-SORNA conduct in failing to register rather than for underlying pre-SORNA sex offenses, and thus application of SORNA to pre-SORNA offenders does not violate the Ex Post Facto Clause.[18] Thus, the crime of failing to register under the sex offender registration statutes constitutes a separate offense from the underlying prior conviction for purposes of ex post facto analysis.[19]

Observations:

The Sex Offender Registration Act does not impose liability unless a person, after becoming subject to SORNA's registration requirements, travels across state lines and then fails to register as required by the Act; travel that occurs before the requirements are enacted cannot be punished, even where the defendant fails to register the travel previous to the requirement; because liability cannot be predicated on pre-SORNA travel, the Court need not address whether the statute violates the Ex Post Facto Clause.[20]

The claim that a trial court's error in failing to instruct the jury as to the enactment date of the Trafficking Victims Protection Act resulted in the defendant being erroneously convicted based exclusively on noncriminal, preenactment conduct, is a due process, rather than ex post facto, claim.[21]

CUMULATIVE SUPPLEMENT

Cases:

Subchapter of law requiring registration of sex offenders was not punitive in effect, and thus retroactive application of law did not violate ex post facto clauses; facts that law did not impose direct affirmative disability or restraint, law was rationally connected to alternative purpose, and lack of excessiveness weighed in favor of finding law nonpunitive, fact that law promoted traditional aims of punishment carried little weight, and fact that law was narrowly tailored to its nonpunitive purpose of protecting public carried significant weight. U.S. Const. art. 1, § 10; Pa. Const. art. 1, § 17; 42 Pa. Cons. Stat. Ann. § 9799.51(b)(1, 2). Commonwealth v. Lacombe, 234 A.3d 602 (Pa. 2020).

[END OF SUPPLEMENT]

Footnotes

1 In re Civil Commitment of W.X.C., 407 N.J. Super. 619, 972 A.2d 462 (App. Div. 2009), judgment aff'd, 204 N.J. 179, 8 A.3d 174 (2010).
Sex offender registration and commitment, generally, see Am. Jur. 2d, Mentally Impaired Persons §§ 125 to 146.

2 U.S. v. White, 782 F.3d 1118 (10th Cir. 2015); Com. v. Lee, 594 Pa. 266, 935 A.2d 865 (2007).

3 Doe v. Gregoire, 960 F. Supp. 1478 (W.D. Wash. 1997).

4 Starkey v. Oklahoma Dept. of Corrections, 2013 OK 43, 305 P.3d 1004 (Okla. 2013); Kitze v. Commonwealth, 23 Va. App. 213, 475 S.E.2d 830 (1996).
Limitation of prohibition to legislation relating to crimes and penalties, generally, see § 688.
To obtain relief from the classification as well as the burden of having to register as a sexual predator, the defendant must persuade the court that the state's restrictions that flow from designation as a sexual predator make the statute penal rather than regulatory, triggering the constitutional prohibition on ex post facto laws. Johnson v. Madigan, 880 F.3d 371 (7th Cir. 2018).
Retroactive application of amended provision of sex offender registration statute, which expanded scope of "relevant information" that sex offender had to provide to sheriff to include Internet identifiers, did not implicate prohibition against ex post facto laws where the statute was nonpunitive. State v. Aschbrenner, 926 N.W.2d 240 (Iowa 2019).

5 U.S. v. Elkins, 683 F.3d 1039 (9th Cir. 2012); In re Nick H., 224 Md. App. 668, 123 A.3d 229 (2015); Doe v. Sex Offender Registry Bd., 472 Mass. 492, 35 N.E.3d 710 (2015); State v. Eighth Jud. Dist. Ct. (Logan D.), 129 Nev. 492, 306 P.3d 369, 129 Nev. Adv. Op. No. 52 (2013).

6 Doe v. Weld, 954 F. Supp. 425 (D. Mass. 1996).
An amendment to Megan's Law, which rescinded the exclusion of certain sex offenders from the Megan's Law Web site and applied retroactively, did not violate ex post facto laws; the purpose of the statute was to protect the public from sex offenders, and thus the statute was not punitive. Doe v. California Dept. of Justice, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (4th Dist. 2009).

7 Kirby v. State, 95 N.E.3d 518 (Ind. 2018).

8 Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016) (examining a Wisconsin statute).
The retroactive application of a statute requiring registered Tier III sex offenders to wear GPS monitoring bracelets while on supervision does not implicate the Ex Post Facto Clause, as the statute is intended for public safety and is not punitive in nature. Doe v. Coupe, 143 A.3d 1266 (Del. Ch. 2016), aff'd, 158 A.3d 449 (Del. 2017).

9 Bacon v. Neer, 631 F.3d 875 (8th Cir. 2011); United States v. Sewell, 712 Fed. Appx. 917 (11th Cir. 2017), cert. denied, 138 S. Ct. 1603, 200 L. Ed. 2d 785 (2018); Long v. Maryland State Department of Public Safety and Correctional Services, 230 Md. App. 1, 146 A.3d 546 (2016); State v. Gibson, 182 A.3d 540 (R.I. 2018).

Whether or not the imposition of sex offender registration requirements after the sex offender has served the sentence is an ex post facto violation, it is not a part of the sentence, but a collateral consequence of the sentence. Kirby v. State, 95 N.E.3d 518 (Ind. 2018).

10 People v. Szwalla, 61 A.D.3d 1289, 877 N.Y.S.2d 757 (3d Dep't 2009).

A city ordinance prohibiting registered sex offenders from residing within 1,500 feet of where children commonly gather did not violate the ex post facto clause; the intent of the ordinance was to establish a civil proceeding and/or to provide a civil remedy, namely, to prevent convicted child sex offenders required to register from having access to children where they commonly gather, not to impose punishment. Duarte v. City of Lewisville, 136 F. Supp. 3d 752 (E.D. Tex. 2015), judgment aff'd, 858 F.3d 348 (5th Cir. 2017).

11 U.S. v. Waddle, 612 F.3d 1027 (8th Cir. 2010); U.S. v. Ambert, 561 F.3d 1202 (11th Cir. 2009); People v. Szwalla, 61 A.D.3d 1289, 877 N.Y.S.2d 757 (3d Dep't 2009).

12 Devine v. Annucci, 150 A.D.3d 1104, 56 N.Y.S.3d 149 (2d Dep't 2017).

13 Commonwealth v. Adams-Smith, 2019 PA Super 151, 209 A.3d 1011 (2019).

14 Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016).

15 Valenti v. Hartford City, Indiana, 225 F. Supp. 3d 770 (N.D. Ind. 2016).

16 Commonwealth v. Muniz, 640 Pa. 699, 164 A.3d 1189 (2017), cert. denied, 138 S. Ct. 925, 200 L. Ed. 2d 213 (2018).

17 18 U.S.C.A. § 2250(a).

18 United States v. Wass, 2020 WL 1443526 (4th Cir. 2020).

19 Frazier v. State, 284 Ga. 638, 668 S.E.2d 646 (2008); Meinders v. Weber, 2000 SD 2, 604 N.W.2d 248 (S.D. 2000).

A 10-year punishment for failure to register under SORNA, for a pre-SORNA conviction, was not "retroactive" to the conviction that led to a defendant's registration requirement as would violate the Ex Post Facto Clause where the law targeted only the conduct undertaken by convicted sex offenders, i.e., failure to register, after the law's enactment. United States v. Morgan, 255 F. Supp. 3d 221 (D.D.C. 2017).

20 Carr v. U.S., 560 U.S. 438, 130 S. Ct. 2229, 176 L. Ed. 2d 1152 (2010).

Sex offender registration statute as ex post facto, generally, see Am. Jur. 2d, Mentally Impaired Persons § 140.

SORNA's registration requirements do not apply to sex offenders convicted before the Act became law and before the Attorney General validly specifies that the Act's registration provision applies to the defendants. Reynolds v. U.S., 565 U.S. 432, 132 S. Ct. 975, 181 L. Ed. 2d 935 (2012).

21 U.S. v. Marcus, 560 U.S. 258, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010).

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16B Am. Jur. 2d Constitutional Law § 700

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law
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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 700. Sex offender legislation as violating Ex Post Facto Clause—Involuntary commitment; DNA sample

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2815, 2822

A.L.R. Library

Validity, Construction, and Application of State Statutes Eliminating, Extending, or Tolling Statute of Limitations for Sexual Offense When DNA Can Provide Identity of Alleged Perpetrator, 16 A.L.R.7th Art. 7

Trial Strategy

Proof of Qualification for Commitment as Mentally Disordered Sex Offender, 51 Am. Jur. Proof of Facts 3d 299

Courts have generally held that sexually violent predator (SVP) proceedings are civil, not punitive,[1] and moreover such proceedings are not intended to and do not punish for prior criminal offenses,[2] thus such laws, establishing involuntary commitment, do not violate the constitutional prohibition against Ex Post Facto laws,[3] even though SVPA proceedings involve a liberty interest and confinement could follow a prison term.[4] An indeterminate commitment term does not violate the Ex Post Facto Clause of the Federal Constitution.[5]

For purposes of an ex post facto analysis, such laws do not have a retroactive or a punitive effect and instead, they permit involuntary confinement for purposes of treatment, frequently in a mental hospital, based on a determination that the person currently both suffers from a mental abnormality or a personality disorder and is likely to pose a future danger to the public; to the extent that past behavior is taken into account, it is used solely for evidentiary purposes.[6] A state SVP act does not establish "criminal" proceedings, and the involuntary confinement pursuant thereto is not punitive, thus precluding a finding of any double jeopardy or ex post facto violation, where:[7]

• the act creates a "civil" commitment procedure

• commitment under the act does not implicate retribution or deterrence

• the act requires no finding of scienter

• immediate release is permitted upon a showing that the confined person is no longer dangerous or mentally impaired

• use of the procedural safeguards traditionally followed in criminal trials does not render the proceedings criminal

• treatment, if possible, is at least an ancillary goal of the act

A statute authorizing counties to contract with the Division of Juvenile Facilities to house wards, committed to county juvenile hall for sex crimes, in order to participate in the Division's sexual offender program is not an ex post facto law even though it applies retroactively to wards who committed their crimes before its effective date, since it merely creates an additional resource to provide sexual offender treatment rather than increasing punishment.[8] Moreover, a commitment of an 18-year old to the Division of Juvenile Facilities does not amount to greater punishment than the local commitments that were available when the juvenile committed the offenses, because it does not increase the time a ward must spend in custody, even though the juvenile may be detained past the age of 21 or 25, and even though such commitment will require sex offender registration at its completion.[9] An act that provides a civil procedure that leads to the designation of an individual as a sexually violent delinquent child, which designation arises not from a judicial finding, but merely from a legislative definition, and does not provide for any punitive ramifications arising from such designation, though it provides for court-ordered involuntary treatment, has a nonpunitive purpose and a nonpunitive effect, and thus does not constitute punishment for purposes of the Ex Post Facto Clause.[10] The Ex Post Facto Clause speaks only to retroactive punishment, and thus the issue in a challenge to the constitutionality of a statute based on retroactive application of a civil disability such as inpatient treatment at a sexual offender residential treatment facility, becomes whether the civil disability imposed constitutes punishment.[11]

A statute that authorizes the collection of DNA samples from currently incarcerated felons is regulatory rather than penal or punitive in nature,[12] and thus an amendment that extends the statute's application to the defendant who had already begun serving a sentence does not violate the Ex Post Facto Clause.[13] DNA collection does not involve concepts of retroactivity or ex post facto implications, but is confined to a simple administrative identifying procedure akin to fingerprinting or keeping one's whereabouts known to law enforcement.[14] In the case of a law requiring a DNA sample before a good time release that punishes refusal to provide a sample as an offense separate from the underlying offense that made the person subject to DNA sampling, such law does not violate the ex post facto prohibition; rather, the punishment is solely for the new offense of refusing to provide

the DNA sample, even though the original offense may have been the "but for" reason for the DNA sample requirement.[15] A statute requiring those convicted of sex offenses to provide a blood sample for a DNA profiling analysis does not violate the Ex Post Facto Clauses of the Federal or State Constitutions when applied to those convicted prior to the statute's effective date, inasmuch as the purpose of the statute is to identify those individuals that have a higher probability to commit crimes, not to punish individuals convicted of those crimes; further, the submission of blood samples for a DNA profiling analysis does not constitute a "punishment," as is required to violate the Ex Post Facto Clauses, because the blood samples are used to further a legitimate governmental interest in law enforcement.[16] The imposition of a mandatory DNA surcharge does not constitute an ex post facto violation with respect to the defendant who was sentenced after the effective date of the governing statute; where the intent of the surcharge is not punitive.[17] Alternatively, a DNA analysis fee the defendant is ordered to pay at sentencing is compensatory instead of punitive, and not a fine, and thus the trial court's imposition of a $250 DNA analysis fee does not violate the prohibition against ex post facto laws.[18]

Footnotes

1 U.S. v. Timms, 664 F.3d 436 (4th Cir. 2012); People v. McKee, 47 Cal. 4th 1172, 104 Cal. Rptr. 3d 427, 223 P.3d 566 (2010); In re Detention of Stanbridge, 2012 IL 112337, 366 Ill. Dec. 505, 980 N.E.2d 598 (Ill. 2012); Kirk v. State, 520 S.W.3d 443 (Mo. 2017), cert. denied, 138 S. Ct. 982, 200 L. Ed. 2d 261 (2018).

2 Matherly v. Andrews, 817 F.3d 115 (4th Cir. 2016).

3 U.S. v. Timms, 664 F.3d 436 (4th Cir. 2012); In re Detention of Stanbridge, 2012 IL 112337, 366 Ill. Dec. 505, 980 N.E.2d 598 (Ill. 2012); Derby v. State, 557 S.W.3d 355 (Mo. Ct. App. W.D. 2018), reh'g and/or transfer denied, (July 31, 2018) and transfer denied, (Oct. 30, 2018); In re Commitment of Gilbert, 2012 WI 72, 342 Wis. 2d 82, 816 N.W.2d 215 (2012).

4 Matter of Care and Treatment of Lester Bradley v. State, 554 S.W.3d 440 (Mo. Ct. App. W.D. 2018), reh'g and/or transfer denied, (July 3, 2018) and transfer denied, (Sept. 25, 2018).

5 People v. Field, 1 Cal. App. 5th 174, 204 Cal. Rptr. 3d 548 (4th Dist. 2016).

6 Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); Kelly v. Gammon, 903 S.W.2d 248 (Mo. Ct. App. W.D. 1995); State v. Carpenter, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).

7 Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

8 In re Robert M., 215 Cal. App. 4th 1178, 155 Cal. Rptr. 3d 795 (5th Dist. 2013).

9 In re Edward C., 223 Cal. App. 4th 813, 167 Cal. Rptr. 3d 536 (1st Dist. 2014).

10 In re H.R., 2018 PA Super 264, 196 A.3d 1059 (2018), appeal granted, 207 A.3d 906 (Pa. 2019) and order aff'd, 2020 WL 1542422 (Pa. 2020).

11 In re H.R., 2018 PA Super 264, 196 A.3d 1059 (2018), appeal granted, 207 A.3d 906 (Pa. 2019) and order aff'd, 2020 WL 1542422 (Pa. 2020).

12 Simmons v. State, Department of Corrections, 426 P.3d 1011 (Alaska 2018); People v. Laird, 27 Cal. App. 5th 458, 238 Cal. Rptr. 3d 313 (4th Dist. 2018), as modified, (Sept. 21, 2018) and review denied, (Jan. 2, 2019); State v. Banks, 321 Conn. 821, 146 A.3d 1 (2016).

13 State v. Banks, 321 Conn. 821, 146 A.3d 1 (2016).

14 Simmons v. State, Department of Corrections, 426 P.3d 1011 (Alaska 2018); People v. Laird, 27 Cal. App. 5th 458, 238 Cal. Rptr. 3d 313 (4th Dist. 2018), as modified, (Sept. 21, 2018) and review denied, (Jan. 2, 2019).

15 Shepard v. Houston, 289 Neb. 399, 855 N.W.2d 559 (2014).

16 Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995); Rise v. State of Or., 59 F.3d 1556 (9th Cir. 1995); Cooper v. Gammon, 943 S.W.2d 699 (Mo. Ct. App. W.D. 1997).

17 State v. Williams, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373 (2018).

18 People v. Higgins, 2014 IL App (2d) 120888, 382 Ill. Dec. 756, 13 N.E.3d 169 (App. Ct. 2d Dist. 2014).

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16B Am. Jur. 2d Constitutional Law § 701

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(2) Legislation Increasing Punishment

§ 701. Application of Ex Post Facto Clause to changes and revisions in federal sentencing guidelines

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2817

A.L.R. Library

United States Parole Commission Guidelines for federal prisoners, 61 A.L.R. Fed. 135

Generally, a sentencing court must use the version of the guidelines in effect at the time of a defendant's sentencing, unless the court determines that doing so would violate the Ex Post Facto Clause.[1] Specifically, the Ex Post Facto Clause proscribes sentencing an offender under a version of the Guidelines that would provide a higher sentencing range than the version in place at the time of the offense.[2] In other words, using a Guidelines Manual revised after an offense occurred to calculate a Guidelines range for that offense violates the Ex Post Facto Clause if the revision leads to a higher punishment; for this reason, a defendant must generally be sentenced under the Guidelines Manual that was in effect when the offense occurred.[3] A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence.[4] However, a law that creates

only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes does not present a sufficient risk, and will not be deemed to be an ex post facto law.[5]

Practice Tip:

A court looks to the date of the last charged offense and the then-existing sentencing guidelines to determine whether an ex post facto issue exists.[6]

The fact that the Supreme Court has rendered the Sentencing Guidelines advisory does not mean that the Guidelines lack sufficient legal effect to attain the status of a law within the meaning of the Ex Post Facto Clause.[7] Moreover, the Ex Post Facto Clause is violated when a defendant is sentenced under Guidelines promulgated after commission of the criminal acts where the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.[8] This determination does not undo the Supreme Court's decision that created an advisory federal sentencing regime to remedy the unconstitutionality of a mandatory Guidelines scheme requiring judges to find facts that increase sentences based on a preponderance of the evidence, since the Sixth Amendment and Ex Post Facto Clause inquiries are analytically distinct.[9]

A defendant is on notice of the maximum statutory penalties when he committed his crimes, and therefore a district court's retroactive application of the remedial portion of the United States Supreme Court's decision in *United States v. Booker* does not violate the Ex Post Facto Clause.[10]

A crime is consummated when it is completed, and as to a continuing offense that was begun prior to the effective date of a guidelines amendment or revision and completed after that date, application of the amendment does not violate the Ex Post Facto Clause.[11] Additionally, where offenses grouped together for sentencing purposes were committed before and after an amended version of the sentencing guidelines went into effect, the use of the amended version of the guidelines does not violate the Ex Post Facto Clause.[12] Moreover, the application of a subsequent Sentencing Guidelines Manual to prior ungrouped offense violates the Ex Post Facto Clause.[13]

Where an amended guideline commentary serves to clarify and does not enhance punishment, the Ex Post Facto Clause is not implicated.[14]

Footnotes

1 Dorsey v. U.S., 567 U.S. 260, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012); United States v. Hendricks, 921 F.3d 320 (2d Cir. 2019), cert. denied, 140 S. Ct. 870 (2020); United State v. Pena, 952 F.3d 503 (4th Cir. 2020), as amended, (Mar. 11, 2020); United States v. Lewis, 2020 WL 128580 (D.N.M. 2020).
As to sentencing guidelines, generally, see Am. Jur. 2d, Criminal Law §§ 748 to 805.

2 United States v. Elbeblawy, 899 F.3d 925, 107 Fed. R. Evid. Serv. 126 (11th Cir. 2018), cert. denied, 139 S. Ct. 1322, 203 L. Ed. 2d 573 (2019).

Under the Ex Post Facto Clause, a court must apply the version of the Sentencing Guidelines in effect when the offense was committed. United States v. Brewington, 944 F.3d 1248 (10th Cir. 2019).

3 United States v. Wijegoonaratna, 922 F.3d 983 (9th Cir. 2019).

Although the Constitution's Ex Post Facto Clause prohibits applying a new act's higher penalties to preact conduct, it does not prohibit applying lower penalties. Dorsey v. U.S., 567 U.S. 260, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012).

4 Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

A substantial risk did not exist that the application of the Sentencing Guidelines in effect at the time of sentencing would result in the imposition of a harsher sentence than the guidelines in effect at the time of the offense, and, thus, the Ex Post Facto Clause was not violated. U.S. v. Wetherald, 636 F.3d 1315 (11th Cir. 2011).

Application of the Sentencing Guidelines in effect at the time of defendant's sentencing would result in a significant risk of an increased sentence, and therefore would violate the Ex Post Facto Clause. U.S. v. Lewis, 606 F.3d 193 (4th Cir. 2010).

5 United States v. Alvaran-Velez, 914 F.3d 665 (D.C. Cir. 2019).

6 U.S. v. Silva, 554 F.3d 13 (1st Cir. 2009).

7 Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

8 Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

9 Peugh v. U.S., 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

Retroactive application of the remedial holding in *United States v. Booker*, requiring a remand for resentencing under the advisory Sentencing Guidelines system if a sentence was imposed under the mandatory guidelines in violation of the Sixth Amendment, to defendants convicted for conspiracy to distribute marijuana and sentenced under the mandatory guidelines, did not violate the Ex Post Facto Clause, even if the sentences imposed on remand were greater than the original sentences, where the defendants' cases were pending on direct review at the time that *Booker* was decided, as long as the sentences imposed did not exceed the statutory maximum for the conspiracy offense determined by the jury. U.S. v. Vaughn, 430 F.3d 518 (2d Cir. 2005), for additional opinion, see, 155 Fed. Appx. 575 (2d Cir. 2005).

10 U.S. v. Burr, 294 Fed. Appx. 800 (4th Cir. 2008).

Retroactive application of the United States Supreme Court's remedial opinion in *United States v. Booker*, for crimes committed before *Booker* was decided, did not violate the ex post facto principle of fair warning incorporated into the Due Process Clause, since when the defendant committed her crime, she had sufficient warning of the potential consequences of her actions. U.S. v. Staten, 466 F.3d 708 (9th Cir. 2006).

11 U.S. v. Josephberg, 562 F.3d 478 (2d Cir. 2009); United States v. Wijegoonaratna, 922 F.3d 983 (9th Cir. 2019).

Sentencing for wire fraud, mail fraud, and making and subscribing false tax returns was governed by the Sentencing Guidelines in effect when the fraudulent scheme ended, and not the Guidelines in effect at time of sentencing, where application of the Guidelines in effect at the time of sentencing would cause an ex post facto violation. United States v. Berry, 795 Fed. Appx. 229 (5th Cir. 2019).

12 U.S. v. Duane, 533 F.3d 441 (6th Cir. 2008).

As to continuing offenses and multiple offenses, generally, see § 693.

13 United States v. Mantha, 944 F.3d 352 (1st Cir. 2019).

14 U.S. v. Johnson, 558 F.3d 193 (2d Cir. 2009).

Clarifying amendments to a statute, generally, see § 690.

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16B Am. Jur. 2d Constitutional Law § 702

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(3) Mitigating or Reducing Punishment; Defenses

§ 702. Application of Ex Post Facto Clause to statutes mitigating or reducing punishment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2815, 2816

The ex post facto prohibition does not bar legislation effecting a change in the penalty for a crime where the change operates to ameliorate or mitigate and not to aggravate the penalty,[1] it being axiomatic that for a law to be an ex post facto measure, it must be more onerous than the prior law.[2]

Footnotes

1 Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); U.S. v. Brady, 88 F.3d 225 (3d Cir. 1996); State v. Carpentino, 166 N.H. 9, 85 A.3d 906 (2014).
A Texas statute which allowed reformation of improper verdicts was not an ex post facto law, as applied to the defendant who had previously been convicted and received an improper sentence and who would have been entitled to a new trial but for the retroactive application of the statute. Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).
If the defendant, who was convicted of purposeful or knowing murder and sentenced to death prior to an amended statute that eliminated the death penalty, was granted postconviction relief, ex post facto principles would preclude imposition of life without parole at a new penalty phase unless aggravating factors were

found to outweigh mitigating factors; absent such a finding, the defendant could only receive the maximum noncapital sentence available at the time of the offense, which was 30 years to life with 30 years of parole ineligibility. State v. Cooper, 410 N.J. Super. 43, 979 A.2d 792 (App. Div. 2009).

2 Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

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16B Am. Jur. 2d Constitutional Law § 703

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(3) Mitigating or Reducing Punishment; Defenses

§ 703. Application of Ex Post Facto Clause to legislation affecting defenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2810

The Supreme Court and other federal and state courts have held that legislation which eliminates or deprives, after the date of a criminal act, a defense available to the accused person at the time the act was committed violates the ex post facto provisions of the United States Constitution.[1] In other words, the Ex Post Facto Clause prohibits states from enacting laws that eliminate defenses to charges for incidents that preceded the enactment.[2]

Footnotes

1 Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); United States v. Hearns, 845 F.3d 641 (5th Cir. 2017); Simmons v. State, Department of Corrections, 426 P.3d 1011 (Alaska 2018); Brigance v. State, 2018 Ark. App. 213, 548 S.W.3d 147 (2018); Barri v. Workers' Comp. Appeals Bd., 28 Cal. App. 5th 428, 239 Cal. Rptr. 3d 180 (4th Dist. 2018); People v. Brown, 2017 IL App (1st) 140508-B, 416 Ill. Dec. 818, 86 N.E.3d 1103 (App. Ct. 1st Dist. 2017); State v. Patterson, 285 So. 3d 1154 (La. Ct. App. 1st Cir. 2019); Matter of A.J.F., 588 S.W.3d 322 (Tex. App. Houston 14th Dist. 2019).

2 Williams v. Department of Corrections and Community Supervision, 136 A.D.3d 147, 24 N.Y.S.3d 18 (1st Dep't 2016).

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16B Am. Jur. 2d Constitutional Law § 704

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(4) Legislation Changing Remedy or Mode of Procedure

§ 704. Application of Ex Post Facto Clause to legislation changing remedy or procedure, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2793, 2810

The prohibition as to the passage of ex post facto laws has no application to changes in laws which relate exclusively to a remedy or mode of procedure[1] and which do not affect matters of substance.[2] The Ex Post Facto Clause is not concerned with mere procedural rules or laws.[3] A law is not procedural if it affects substantive rights, and a law violates the ex post facto clauses only if it affects substantive rights.[4] A merely procedural law does not change the legal consequences of acts completed before its effective date and therefore does not violate the Ex Post Facto Clause when applied retroactively.[5] Procedural changes to a law which do not alter the definition of criminal conduct or increase the penalty by which a crime is punishable do not violate the Ex Post Facto Clause.[6]

The inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed.[7]

Observation:

The legislature does not immunize a law from scrutiny under the Ex Post Facto Clause simply by labeling it "procedural," since subtle ex post facto violations are no more permissible than overt ones.[8]

Footnotes

1 Beazell v. Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925).
There is no ex post facto violation if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. PA Prison Soc. v. Cortes, 622 F.3d 215 (3d Cir. 2010); State v. Hester, 449 N.J. Super. 314, 157 A.3d 865 (App. Div. 2017), judgment aff'd, 233 N.J. 381, 186 A.3d 236 (2018).

2 Ruhlman v. Brunsman, 664 F.3d 615 (6th Cir. 2011); Dunlap v. State, 159 Idaho 280, 360 P.3d 289 (2015); People v. Moffett, 2019 IL App (2d) 180964, 2019 WL 6888499 (Ill. App. Ct. 2d Dist. 2019), appeal denied, 2020 WL 1488610 (Ill. 2020); Butler v. State, 140 N.E.3d 870 (Ind. Ct. App. 2019); People v. Earl, 297 Mich. App. 104, 822 N.W.2d 271 (2012), judgment aff'd, 495 Mich. 33, 845 N.W.2d 721 (2014); York v. Tennessee Board of Parole, 502 S.W.3d 783 (Tenn. Ct. App. 2016).
Legal changes must be substantive, rather than procedural, to give rise to an Ex Post Facto Clause violation. Smith v. Ryan, 823 F.3d 1270 (9th Cir. 2016).

3 People v. Bott, 2019 COA 100, 2019 WL 2850135 (Colo. App. 2019), cert. granted, 2019 WL 7163381 (Colo. 2019); In re McNeil, 181 Wash. 2d 582, 334 P.3d 548 (2014).

4 Roberio v. Massachusetts Parole Board, 483 Mass. 429, 133 N.E.3d 792 (2019).

5 State v. Bernhardt, 304 Kan. 460, 372 P.3d 1161 (2016).
A defendant does not have a protected interest in procedural rules, and thus retroactive application of an amendment to a procedural rule is not an unconstitutional ex post facto law. State v. Romero, 2011-NMSC-013, 150 N.M. 80, 257 P.3d 900 (2011).

6 U.S. v. Gianelli, 543 F.3d 1178 (9th Cir. 2008).
A procedural change in law is not necessarily ex post facto, even though it may work to the disadvantage of the defendant. Ruhlman v. Brunsman, 664 F.3d 615 (6th Cir. 2011); Lard v. State, 2014 Ark. 1, 431 S.W.3d 249 (2014); Dunlap v. State, 159 Idaho 280, 360 P.3d 289 (2015); Butler v. State, 140 N.E.3d 870 (Ind. Ct. App. 2019).

7 Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); Butler v. State, 140 N.E.3d 870 (Ind. Ct. App. 2019).

8 Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); Starkey v. Oklahoma Dept. of Corrections, 2013 OK 43, 305 P.3d 1004 (Okla. 2013).
Merely labeling a law "procedural" does not prevent review under the ex post facto clause because it is the effect, not the form, of the law that determines whether it is ex post facto. State v. Pruitt, 510 S.W.3d 398 (Tenn. 2016).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(4) Legislation Changing Remedy or Mode of Procedure

§ 705. Application of Ex Post Facto Clause to changes in laws affecting indictments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2810, 2827

A statute changing the mode of procedure in criminal cases from indictment to information is not ex post facto as applied to offenses committed before its passage and takes away no substantial right of an accused,[1] although a few courts have taken the view that the adoption of a law authorizing the prosecution of crimes already committed by information instead of by indictment is forbidden by the Ex Post Facto Clause of the Constitution, on the theory that the right to an indictment is a substantial right of the accused.[2]

Changes to a statute governing the amendment of a charging information, which permits amendment to a charging information at any time prior to trial as long it would not prejudice substantial rights of the defendant, is a "procedural" change rather than a substantive change and, therefore, does not implicate the ex post facto provisions of State or Federal Constitutions.[3] Similarly, a statute permitting the consolidation into one indictment of charges of crimes of a similar nature or constituting parts of a common plan or scheme is not, as applied to crimes committed prior to its enactment, violative of the Ex Post Facto Clause of the Federal Constitution.[4]

Footnotes

1 Crowder v. State, 218 Ga. App. 630, 462 S.E.2d 754 (1995); Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996).
Definitions of indictments and informations, see Am. Jur. 2d, Indictments and Informations §§ 1, 3.

2 Garnsey v. State, 1910 OK CR 248, 4 Okla. Crim. 547, 112 P. 24 (1910).

3 Gomez v. State, 907 N.E.2d 607 (Ind. Ct. App. 2009).

4 State v. Sepulvado, 342 So. 2d 630 (La. 1977) (abrogated on other grounds by, State ex rel. Olivieri v. State, 779 So. 2d 735 (La. 2001)).

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16B Am. Jur. 2d Constitutional Law § 706

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(4) Legislation Changing Remedy or Mode of Procedure

§ 706. Application of Ex Post Facto Clause to changes relating to juries or jury trials in general

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2827

A.L.R. Library

Statute reducing number of jurors as violative of right to trial by jury, 47 A.L.R.3d 895

Jury: number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together, 21 A.L.R.3d 725

Number of and procedures for exercising peremptory challenges allowed in federal criminal trial for selection of regular jurors—modern cases, 110 A.L.R. Fed. 626

The Supreme Court has held that a 12-member jury is not a necessary ingredient of the Sixth Amendment's guarantee of trial by jury in all criminal cases.[1] Rulings from other courts now support this view.[2] The Supreme Court has also held that the Ex Post Facto Clause in Article I, § 10 of the United States Constitution does not prevent a state from taking away a criminal defendant's right to jury trial under the United States Constitution's Sixth Amendment because, although the right to jury trial provided by

the Sixth Amendment is a "substantial" one, it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause.[3]

No ex post facto violation results from applying a statute which provides that a venireperson's qualifications are not grounds for a new trial or reversal if the juror was removed by peremptory strike, given that the statute was procedural in nature and became effective prior to the final disposition of the appeal.[4]

An act providing for bifurcated proceedings of determinations of guilt and punishment in felony cases does not violate a state's ex post facto clause, even though the act applies to criminal acts that occurred before its effective date.[5] Also, in a prosecution on charges relating to the 1993 bombing of the World Trade Center, imposition of 180-year sentences did not violate the Ex Post Facto Clause even though the law in effect at the time of the crime, requiring a jury recommendation before the court could impose a life term, had subsequently been changed, and even though the sentences were the equivalent of life sentences; the change in law did not change the substantive definition of the crime, increase the punishment, or eliminate any defense with respect to the offense charged.[6] Changing the place of a trial after commission of an offense does not violate the ex post facto prohibition,[7] nor does replacing punishment of life imprisonment or death, at the jury's determination and recommendation, with a separate sentencing hearing (at which the defendant could present mitigating evidence) and automatic appellate review.[8]

Footnotes

1 Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).
Right to jury trial, generally, see Am. Jur. 2d, Criminal Law §§ 952 to 958.

2 Duvall v. U.S., 676 A.2d 448 (D.C. 1996).

3 Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

4 State v. Richardson, 923 S.W.2d 301 (Mo. 1996).
As to the right to an impartial jury, generally, see Am. Jur. 2d, Criminal Law §§ 961 to 965.

5 Williams v. State, 325 Ark. 432, 930 S.W.2d 297 (1996).
As to the determination of punishment by jury, generally, see Am. Jur. 2d, Criminal Law § 958.

6 U.S. v. Yousef, 327 F.3d 56, 61 Fed. R. Evid. Serv. 251 (2d Cir. 2003).

7 Mundy v. Superior Court, 31 Cal. App. 4th 1396, 37 Cal. Rptr. 2d 568 (4th Dist. 1995), as modified, (Feb. 27, 1995).

8 Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(4) Legislation Changing Remedy or Mode of Procedure

§ 707. Application of Ex Post Facto Clause to changes in functions of court and jury; sentencing procedures

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2810, 2815, 2827

Statutes altering the procedure for sentencing an accused convicted of a crime have been held not to amount to ex post facto laws, even as applied to offenses committed prior to their enactment.[1] That new procedures could result in a higher sentence for a prisoner does not establish an ex post facto violation.[2] Application of a state's new capital sentencing statutes that makes a procedural change to the law as it existed when the murder defendants committed their crimes does not constitute an ex post facto violation under either the United States or the State Constitutions where the new law altered the process used to determine whether the death penalty would be imposed, but made no change to the punishment attached to first-degree murder, and added no new element, or functional equivalent of an element, to first-degree murder.[3] Additionally, a court's failure to conduct a proportionality review on the direct appeal of death sentence imposed upon retrial in a first-degree murder prosecution did not violate ex post facto principles, though the capital offense and initial trial occurred prior to the effective date of statutory amendments eliminating the requirement of proportionality review, where the death sentence was not imposed until after those amendments took effect.[4]

A state law which did not take away the defendant's right to elect to have the jury assess a punishment but merely changed the time at which the defendant could elect to exercise this still existing right was not an ex post facto law.[5] No violation of

the Ex Post Facto Clause was found from legislation changing the sentencing role of the court and the jury in death penalty prosecutions, particularly where such changes were, on the whole, ameliorative.[6] A change in the law requiring the court rather than the jury to fix punishment is not unconstitutional as being ex post facto.[7] Also, a change in law requiring the jury rather than the judge to determine the existence of aggravating circumstances in a death penalty case does not constitute improper ex post facto legislation with respect to murders committed before the statute's enactment and after the *Ring v. Arizona* case,[8] which held that, other than the finding of a prior conviction, the determination of aggravating circumstances in a capital case must be made by a jury.[9]

A statute which requires the trial court to dismiss the sentencing jury and empanel a new jury if the original jury cannot reach unanimous verdict on a sentence for capital murder, which changes the law in effect at the time of the murder that any doubt as to a sentence for capital murder would be resolved in favor of one for life imprisonment, is not an impermissible ex post facto law, where empaneling a new jury when the first jury cannot agree unanimously on the sentence creates no new liability.[10]

Admission of victim impact evidence at sentencing pursuant to a statute which came into effect after the defendant committed the criminal conduct but before trial did not violate the prohibition against ex post facto laws as the legislative change which permitted the victim impact statements at sentencing was procedural.[11] Also, the presentation of victim impact testimony in a retrial of the penalty phase based on amendments to the victim impact statutes that occur after the offense is committed and after the original trial but before retrial, does not violate constitutional prohibitions regarding ex post facto laws, and thus the presentation is proper where the amendments were not substantive and did not change or redefine any out-of-court rights, obligations, or duties for which the defendant was being prosecuted, and the amendments changed no legal standard pertaining to the crimes or punishment.[12] Applying United States Supreme Court case law[13] allowing victim impact evidence notwithstanding an earlier case prohibited such evidence, where the murder at issue was committed before the later Supreme Court decision, does not violate ex post facto principles.[14]

Footnotes

1 Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); U.S. v. DePrima, 165 F.R.D. 61 (E.D. Va. 1996).
As to the effect of the Ex Post Facto Clause on changes and revisions in the federal sentencing guidelines, see § 701.
Sentencing procedure, generally, see Am. Jur. 2d, Criminal Law §§ 709 to 728.

2 In re Personal Restraint of Dyer, 164 Wash. 2d 274, 189 P.3d 759 (2008).

3 State v. Perry, 192 So. 3d 70 (Fla. 5th DCA 2016), certified question answered on other grounds, 210 So. 3d 630 (Fla. 2016).

4 Com. v. Sattazahn, 597 Pa. 648, 952 A.2d 640 (2008).

5 Donald v. Jones, 445 F.2d 601 (5th Cir. 1971).

6 In Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); State v. Vela, 279 Neb. 94, 777 N.W.2d 266 (2010).

7 State v. Chandler, 908 S.W.2d 181 (Mo. Ct. App. E.D. 1995).

8 Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

9 State v. Vela, 279 Neb. 94, 777 N.W.2d 266 (2010).

10 State v. Prince, 226 Ariz. 516, 250 P.3d 1145 (2011).

11 Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008); Windom v. State, 656 So. 2d 432 (Fla. 1995).
Victim impact statement, generally, see Am. Jur. 2d, Criminal Law § 874.

12 Gaither v. Commonwealth, 521 S.W.3d 199 (Ky. 2017).

13 Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

14 People v. Tully, 54 Cal. 4th 952, 145 Cal. Rptr. 3d 146, 282 P.3d 173 (2012).

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16B Am. Jur. 2d Constitutional Law § 708

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(4) Legislation Changing Remedy or Mode of Procedure

§ 708. Application of Ex Post Facto Clause to changes affecting appellate review

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2810, 2812

Statutes changing the law with respect to the availability of or procedure for obtaining judicial review of a lower court decision have been held not to violate the prohibition against ex post facto laws found in the United States Constitution.[1] A change of a standard of review does not implicate the Ex Post Facto Clause as a change to standard of review is essentially a procedural change rather than substantive one,[2] where it does not alter the definition of criminal conduct or change the punishment for any offenses.[3] The ex post facto ban has been held not to have been violated by a statute establishing a shorter but still sufficient time limit within which an appeal must be taken.[4] Retroactive application of a statute that requires defendants to object in order to preserve sentencing issues for appeal does not violate the constitutional prohibition on ex post facto laws, since the statute does not change the legal consequences of the acts that the defendant committed but rather was merely a procedural change.[5] Where a state postconviction procedure act's changes to capital postconviction relief procedures did not alter or remove capital petitioners' access to a remedial review provided by the statute, the new procedures did not violate the Ex Post Facto Clause.[6]

Footnotes

1 Duncan v. State, 152 U.S. 377, 14 S. Ct. 570, 38 L. Ed. 485 (1894); Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 1 L. Ed. 648, 1798 WL 587 (1798).

2 U.S. v. Dickerson, 381 F.3d 251 (3d Cir. 2004), as amended, (Aug. 28, 2006).

3 Garrison v. Workman, 509 Fed. Appx. 720 (10th Cir. 2013).

Where the standard of review changes, but there is no alteration in what the State was required to prove in order to convict the capital murder defendant, there is no violation of the Ex Post Facto Clause. State v. Nash, 339 S.W.3d 500 (Mo. 2011).

4 Martinez v. State, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997); State v. Wickline, 74 Ohio St. 3d 369, 1996-Ohio-19, 658 N.E.2d 1052 (1996).

As to changes in time limits for postconviction relief, see § 710.

5 Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997).

6 Mitchell v. State, 1997 OK CR 9, 934 P.2d 346 (Okla. Crim. App. 1997).

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16B Am. Jur. 2d Constitutional Law § 709

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(5) Other Substantive Changes

§ 709. Application of Ex Post Facto Clause to legislation, rules, and procedures affecting postconviction parole, supervised release, clemency, or early release

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2823

A.L.R. Library

United States Parole Commission Guidelines for federal prisoners, 61 A.L.R. Fed. 135

The Supreme Court has identified the following factors as relevant to the inquiry of whether parole measures violate the Ex Post Facto Clause:

(1) whether the parole board has discretion to determine if an inmate is eligible for release;[1]

(2) whether the parole board has the authority to tailor the frequency of the parole hearings to a particular inmate's circumstances;[2]

(3) whether the challenged statute permits an expedited parole review in the event the inmate's circumstances change;[3]

(4) whether an administrative appeal is available;[4] and

(5) the likelihood the plaintiff would be released on parole if he received a hearing sooner than his next scheduled hearing.[5]
A statute amending parole procedures to allow a state parole board to decrease the frequency of parole suitability hearings under certain circumstances does not violate the Ex Post Facto Clause as applied to a defendant who was convicted prior to the amendment,[6] since the statute does not increase the defendant's punishment, but simply alters the method to be followed in fixing a parole release date under identical substantive standards.[7]

Retroactive changes in laws governing parole, which includes changes to regulations and even guidelines governing the parole process, in some instances can violate the ex post facto clause of the constitution.[8] Specifically, parole authorities violate the Ex Post Facto Clause when (1) they apply parole laws or guidelines promulgated after offender was convicted, and (2) that retroactive application creates significant risk of prolonging offender's incarceration as compared to application of prior guidelines.[9] When a challenged law or administrative policy does not by its terms show a significant risk of increased punishment in violation of the Ex Post Facto Clause, the inmate must demonstrate, by evidence drawn from the rule's practical implementation, that its retroactive application will result in a longer period of incarceration than under the earlier rule.[10] However, parole guidelines not in effect at the time of the inmate's sentencing but applied to the inmate's first parole hearing do not constitute an ex post facto violation.[11] Specifically, adoption of a "salient factor scoring analysis" for use in setting release dates for prison inmates does not violate the Ex Post Facto Clause by introducing guidelines not in effect at the time of the inmates' convictions; while this system changes the method to be followed in setting release dates, it does not mandate a particular result that would necessarily lengthen an inmate's confinement.[12]

The amendment to a commutation application procedure does not violate a prisoner's protection against ex post facto laws because commutations are wholly discretionary and unpredictable, making it nearly impossible to demonstrate a significant risk that a prisoner would be denied commutation that he or she might otherwise have received if the policy had not been amended.[13]

As to statutory amendments increasing the proportion of votes required of the parole board for certain crimes before parole will be granted, some courts have held that such amendment is not, on its face, an unconstitutional ex post facto violation because the inherent effect of the supermajority amendment does not create a significant risk of increased punishment for covered individuals, and in this case, it applied only to a class of individuals, those sentenced to life in prison, for whom the probability of release on parole was very low.[14] On the other hand, it has been held that such statutory amendment, applicable to persons convicted of a violent crime, violates the Ex Post Facto prohibition.[15]

A retroactive application of a parole statute that authorized a victim to request a full hearing concerning the parole of an inmate did not violate the constitutional prohibition against ex post facto laws; the statute was procedural in nature and did not impact the inmate's punishment.[16] However, the ex post facto clause prohibits retroactive application of parole regulations that create a significant risk of prolonging an inmate's incarceration, while preserving for parole boards some flexibility in the way they exercise their discretion prospectively.[17] A parole board's extension of a defendant's release date for two years under provisions of an amendment to a statute that became effective after his incarceration does violate the Ex Post Facto Clauses of the State and the Federal Constitutions.[18] Likewise, it is an ex post facto application to subject a former inmate to the postincarceration supervision requirements of a statute that did not become effective until at least seven years after the offense, as it aggravates the punishment as compared to the punishment when committed.[19] Similarly, a statutory amendment that requires that 85% of a sentence be served and that eliminates opportunities for parole that had previously existed is an ex post facto law as applied to

defendants who had been charged with crimes before the effective date of the statute and whose charges were not to be disposed of until after the effective date.[20]

Observation:

Proceedings in which sex offenders' conditional release dates were extended due to their failure to complete sex offender treatment program while incarcerated were civil in nature such that parole board's reliance upon an amended parole eligibility statute did not implicate offenders' right of protection against ex post facto laws; the challenge to the extension of a conditional release date was not a challenge to the sentence imposed, but was instead a challenge to the validity of detention after conviction.[21]

Without going so far as to decide the issue, the Supreme Court has indicated that a statute taking away parole eligibility for offenses subject to parole according to the law at the time they were committed could be found to be constitutionally impermissible as an ex post facto law.[22] Indeed, according to some courts, retroactive changes that affect parole eligibility are a proper subject for application of the Ex Post Facto Clause.[23] But where amended parole statutes did not change the substantive standard for whether to release inmates, but instead only set minimum and maximum deferral periods, whereas before, no such minimum or maximum periods existed, there is no ex post facto violation.[24] As to early or temporary release programs, some changes affecting these programs having been held unconstitutional,[25] while other changes having been held constitutional.[26]

Sanctions imposed upon revocation of supervised release are part of the penalty for the initial offense, and thus to sentence a defendant to a further term of supervised release under a statute enacted subsequent to the original offense would be to apply the statute retroactively, for ex post facto purposes.[27]

Footnotes

1 Garner v. Jones, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000); Johnson v. Kansas Parole Bd., 419 Fed. Appx. 867 (10th Cir. 2011), as amended on reh'g in part, (Apr. 29, 2011).
As to parole, generally, see Am. Jur. 2d, Pardon and Parole §§ 72 to 126.

2 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); Johnson v. Kansas Parole Bd., 419 Fed. Appx. 867 (10th Cir. 2011), as amended on reh'g in part, (Apr. 29, 2011).

3 Garner v. Jones, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000); Johnson v. Kansas Parole Bd., 419 Fed. Appx. 867 (10th Cir. 2011), as amended on reh'g in part, (Apr. 29, 2011).

4 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); Johnson v. Kansas Parole Bd., 419 Fed. Appx. 867 (10th Cir. 2011), as amended on reh'g in part, (Apr. 29, 2011).

5 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); Johnson v. Kansas Parole Bd., 419 Fed. Appx. 867 (10th Cir. 2011), as amended on reh'g in part, (Apr. 29, 2011).

6 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); Clark v. Fallin, 654 Fed. Appx. 385 (10th Cir. 2016); Johnson v. Kansas Parole Bd., 419 Fed. Appx. 867 (10th Cir. 2011), as amended on reh'g in part, (Apr. 29, 2011); Hill v. Walker, 241 Ill. 2d 479, 350 Ill. Dec. 321, 948 N.E.2d 601 (2011).

7 California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).

Amendment that extended the setback period for subsequent review of a parole application from three years to five years did not violate the Ex Post Facto Clause; the effect of the amendment was to allow the parole board to exercise one facet of its discretion for fixing a parole release date, but did not affect a covered prisoner's initial eligibility date, standards for parole eligibility, or the board's statutory obligation to consider the merits of the prisoner's application. Roberio v. Massachusetts Parole Board, 483 Mass. 429, 133 N.E.3d 792 (2019).

Although a ballot initiative likely reduces the frequency of parole hearings for inmates sentenced to life with possibility of parole, it does not violate the Ex Post Facto Clause where it also allows them to petition the parole board to advance the date of the next parole hearing, the board exercises its discretion to grant some petitions and deny others, there is no evidence of any structural barriers to granting petitions to advance, and there is no evidence that the petition process fails to afford relief from the risk of lengthened incarceration posed by the initiative. Gilman v. Brown, 814 F.3d 1007 (9th Cir. 2016).

8 Bailey v. Fulwood, 793 F.3d 127 (D.C. Cir. 2015).

9 Kyles v. Davis, 734 Fed. Appx. 912 (5th Cir. 2018), cert. denied, 139 S. Ct. 423, 202 L. Ed. 2d 325 (2018); Johnson v. District of Columbia, 927 F.3d 539 (D.C. Cir. 2019); Clay v. Massachusetts Parole Bd., 475 Mass. 133, 56 N.E.3d 145 (2016); Coles v. Bisbee, 134 Nev. 508, 422 P.3d 718, 134 Nev. Adv. Op. No. 62 (2018).

10 Wool v. Pallito, 207 Vt. 586, 2018 VT 63, 193 A.3d 510 (2018).

11 State ex rel. Wolfe v. Ohio Adult Parole Authority, 2008-Ohio-5619, 2008 WL 4762981 (Ohio Ct. App. 10th Dist. Franklin County 2008).

12 Amen-Ra v. Department of Defense, 961 F. Supp. 256 (D. Kan. 1997), judgment aff'd, 149 F.3d 1190 (10th Cir. 1998).

13 Bird v. Wyoming Board of Parole, 2016 WY 100, 382 P.3d 56 (Wyo. 2016).

14 Clay v. Massachusetts Parole Bd., 475 Mass. 133, 56 N.E.3d 145 (2016).

15 Barton v. South Carolina Dept. of Probation Parole and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013).

16 Greene v. Ohio Adult Parole Auth., 2008-Ohio-5972, 2008 WL 4927437 (Ohio Ct. App. 10th Dist. Franklin County 2008).

17 Bailey v. Fulwood, 793 F.3d 127 (D.C. Cir. 2015).

18 Shelton v. Armenakis, 146 Or. App. 521, 934 P.2d 512 (1997).

19 Roach v. Kentucky Parole Board, 553 S.W.3d 791 (Ky. 2018).

20 Puckett v. Abels, 684 So. 2d 671 (Miss. 1996).

21 Reynolds v. Missouri Board of Probation and Parole, 468 S.W.3d 413 (Mo. Ct. App. W.D. 2015).

22 Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974).

23 Roberio v. Massachusetts Parole Board, 483 Mass. 429, 133 N.E.3d 792 (2019).

24 Mendacino v. Board of Parole and Post-Prison Supervision, 287 Or. App. 822, 404 P.3d 1048 (2017), review denied, 362 Or. 508, 424 P.3d 724 (2018).

25 Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997) (a state statute which retroactively cancelled provisional early release credits awarded to a state prisoner to be an unconstitutional ex post facto law).

26 Dorst v. Pataki, 167 Misc. 2d 329, 633 N.Y.S.2d 730 (Sup 1995), aff'd, 228 A.D.2d 4, 654 N.Y.S.2d 198 (3d Dep't 1997), order aff'd, 90 N.Y.2d 696, 665 N.Y.S.2d 65, 687 N.E.2d 1348 (1997) (the ex post facto doctrine does not apply to an inmate temporary release program).

27 Johnson v. U.S., 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).

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16B Am. Jur. 2d Constitutional Law § 710

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Constitutional Law

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(5) Other Substantive Changes

§ 710. Application of Ex Post Facto Clause to legislation changing limitations of actions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2811, 2826

Legislation reviving the statute of limitations on civil law claims does not violate constitutional principles, including the Ex Post Facto Clause, unless the statute is so punitive either in purpose or effect as to negate the state's intention to deem it civil.[1] Since it only applies to penal legislation, the Ex Post Facto Clause also does not apply to a False Claims Act amendment permitting an amended claim to relate back to the time of the original complaint for limitations purposes.[2]

The Ex Post Facto clause is not violated by application of a statute extending the statute of limitations for a crime, where the charged offense is not time-barred on the effective date of the statute.[3] Indeed, a state legislature can extend the limitations period without violating the constitutional prohibition against ex post facto laws if it (a) does so before prosecution is barred by the old statute, and (b) clearly indicates that the new statute is to apply to cases pending when it becomes effective.[4] Thus, a statutory amendment that removes the six-year limitations period for unlawful sexual contact does not constitute an unconstitutional ex post facto law, when the amendment only applies retroactively to offenses where the original limitations period has not yet expired.[5] At the same time, a statute permitting prosecution for certain sex offenses to "be commenced within one year after the suspect is conclusively identified by DNA testing" if the suspect is so identified after the expiration of the limitations period violates the Ex Post Facto Clause of the United States Constitution when applied to cases in which the limitations period expired before the statute came into effect.[6]

Application of a statutory amendment that extends the statute of limitation period for rape from seven to 15 years does not violate the prohibitions against Ex Post Facto laws under the United States and state constitutions, even though the legislature extended the limitation period after the rape occurred, where the original limitation period has not expired at the time the limitation period is extended.[7] However, a penal statute enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution.[8]

A statute providing a two-year period after the final disposition of the petitioner's direct appeal to file for postconviction relief is not an ex post facto law as applied to the defendant, where the defendant's direct appeal from the first-degree murder conviction was not final until three years after the statute was enacted, so it did not alter the consequences of any acts committed by defendant prior to the statute's enactment.[9] A statute of limitations requiring a prisoner to petition for postconviction relief within three years of the date of the final action in the prisoner's case or forego the right to petition, but which allowed the petitioner seeking to bring any postconviction petition that would have been barred on the date of enactment of the statute three additional years from that date in which to file the petition, was not an ex post facto law and did not violate due process requirements.[10]

Footnotes

1 Coats v. New Haven Unified School District, 2020 WL 1181526 (Cal. App. 1st Dist. 2020).

2 U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 608 F.3d 871, 82 Fed. R. Evid. Serv. 1187 (D.C. Cir. 2010).

3 Cruz v. Maypa, 773 F.3d 138 (4th Cir. 2014); United States v. Mohamed, 148 F. Supp. 3d 232, 99 Fed. R. Evid. Serv. 5 (E.D. N.Y. 2015); Smith v. State, 213 So. 3d 722 (Fla. 2017); State ex rel. Puderer v. State, 202 So. 3d 978 (La. 2016).
As to statutes of limitation, generally, see Am. Jur. 2d, Criminal Law §§ 241 to 268.

4 State v. Estime, 259 So. 3d 884 (Fla. 4th DCA 2018).

5 State v. Reynolds, 2018 ME 124, 193 A.3d 168 (Me. 2018).

6 Tipton v. Montana Thirteenth Judicial District Court, 2018 MT 164, 392 Mont. 59, 421 P.3d 780 (2018), cert. denied, 139 S. Ct. 1167, 203 L. Ed. 2d 197 (2019).

7 Lynch v. State, 346 Ga. App. 849, 815 S.E.2d 340 (2018).

8 Harms v. Cline, 27 F. Supp. 3d 1173 (D. Kan. 2014); Strong v. Superior Court, 198 Cal. App. 4th 1076, 132 Cal. Rptr. 3d 18 (4th Dist. 2011); People v. Hicks, 262 P.3d 916 (Colo. App. 2011); Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 119 A.3d 462 (2015).

9 Jones v. State, 883 N.W.2d 596 (Minn. 2016).

10 Austin v. Bell, 927 F. Supp. 1058 (M.D. Tenn. 1996).
Changes affecting appellate review, generally, see § 708.

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16B Am. Jur. 2d Constitutional Law § 711

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

1. Ex Post Facto Laws

b. Particular Legislation as Ex Post Facto

(5) Other Substantive Changes

§ 711. Application of Ex Post Facto Clause to legislation changing rules of evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2812

The prohibition against ex post facto laws applies to every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[1]

Legislative enactments that merely permit the jury to consider certain kinds of evidence for certain purposes, and are applied to conduct committed before enactment, do not raise ex post facto concerns.[2] A statute permitting, in a sex offense prosecution, admission of evidence regarding the defendant's commission of a prior sex offense does not alter the definition of the crime, increase the punishment, or eliminate a defense; thus, application of the statute in a trial of an offense committed prior to the effective date of the statute does not violate the Ex Post Facto Clause of the State or Federal Constitutions.[3] A state constitutional amendment that enacted a new rule of evidence, which allowed relevant evidence of prior criminal acts to be admissible in prosecutions for crimes of a sexual nature involving a minor victim for the purpose of corroborating the victim's testimony or demonstrating the defendant's propensity to commit the charged crime, applies prospectively to all trials occurring on or after the amendment's effective date regardless of when the crimes were alleged to have occurred, and did not violate the prohibition against ex post facto laws.[4]

To the extent that a new version of a sentencing statute changes the evidence admissible at the penalty phase, it does not impermissibly provide that less or different testimony is sufficient to convict; where the legal standard for sentencing a defendant

to death remains the same, it is not an ex post facto law.[5] Even where a new sentencing scheme requires the jury to unanimously find an aggravating factor to impose the death penalty, this neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable, so that the application of the scheme to a capital murder defendant who committed the offenses prior to the passage of the new scheme does not violate the prohibition against ex post facto laws.[6] Also, a change in a state's sentencing statute so that it permitted any evidence relevant to a determination of leniency, although the statute in effect at the time of the murders permitted the parties to rebut any information received at the sentencing hearing, concerned the admissibility of evidence and was procedural, rather than substantive, and, thus, applying the amended statute does not violate the Ex Post Facto clause in the penalty phase of a capital murder case, even if the later version broadens the range of admissible rebuttal evidence.[7]

Application of a statute providing for admission of evidence of a defendant's prior sex offense against a minor in a subsequent prosecution for a sex offense against a minor does not violate the defendant's right of protection against ex post facto laws, even though the conduct charged in defendant's case occurred before the statute took effect where the altered evidentiary standard did not lower the quantum of proof or value of the evidence needed to convict defendant.[8] However, the retroactive application of a rule that specifies the type or quantum of proof required to support a criminal conviction violates the ex post facto clause.[9] Ordinary rules of evidence do not violate the ex post facto clause,[10] as such rules are ordinarily evenhanded in the sense that they may benefit either the state or the defendant in any given case, and such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence because they do not concern whether the admissible evidence is sufficient to overcome the presumption.[11] However, it has been held that retroactive application of a statutory amendment replacing judicial discretion with a mandatory requirement for admission of evidence, if offered, of prior convictions for the purpose of impeaching the credibility of a witness, to a defendant testifying in a prosecution for a crime committed prior to the effective date of such amendment, would violate the constitutional prohibition against ex post facto laws.[12]

The general rule that a law concerning evidence is an ex post facto law, has been limited to some extent in that it does not apply to rules which merely relate to the mode of presenting questions and proof as to the relative credibility or genuineness of evidence, where the right of the jury to determine the sufficiency or effect of the evidence is left unimpaired.[13] Where the capital murder defendant asserts that a change in the law since the murder imposes a lower burden of proof on the state to impose the death penalty and thus violates the Ex Post Facto Clause, the relevant question is whether the law affects the quantum of evidence required to convict, and so long as it does not, and the change does not lessen the state's burden to prove the existence of aggravating circumstances, there is no ex post facto violation.[14] A shift in the burden and degree of proof relating to an insanity defense has been held to constitute an ex post facto law.[15]

Footnotes

1 Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); U.S. v. Kurtz, 819 F.3d 1230 (10th Cir. 2016); Dibble v. Klee, 373 F. Supp. 3d 846 (E.D. Mich. 2019); Matter of Bethea, 255 N.C. App. 749, 806 S.E.2d 677 (2017), review denied, 371 N.C. 118, 813 S.E.2d 241 (2018) and cert. denied, 139 S. Ct. 793, 202 L. Ed. 2d 570 (2019); Mason v. State, 2018 OK CR 37, 433 P.3d 1264 (Okla. Crim. App. 2018); Nunn v. Tennessee Department of Correction, 547 S.W.3d 163 (Tenn. Ct. App. 2017), appeal denied, (Mar. 15, 2018) and cert. denied, 139 S. Ct. 446, 202 L. Ed. 2d 315 (2018); In Interest of M.D.G., 527 S.W.3d 299 (Tex. App. El Paso 2017).
A law is disadvantageous to a defendant under ex post facto principles if it alters the rules of evidence making a conviction easier. People v. Moffett, 2019 IL App (2d) 180964, 2019 WL 6888499 (Ill. App. Ct. 2d Dist. 2019), appeal denied, 2020 WL 1488610 (Ill. 2020).

2 Mason v. State, 2018 OK CR 37, 433 P.3d 1264 (Okla. Crim. App. 2018).
Changes relating to juries, see § 706.

3 People v. Fitch, 55 Cal. App. 4th 172, 63 Cal. Rptr. 2d 753 (3d Dist. 1997).

4 State v. Thigpen, 548 S.W.3d 302 (Mo. Ct. App. E.D. 2017), transfer denied, (July 3, 2018).

5 State v. Medina, 232 Ariz. 391, 306 P.3d 48 (2013).

6 Victorino v. State, 241 So. 3d 48 (Fla. 2018), cert. denied, 139 S. Ct. 328, 202 L. Ed. 2d 230 (2018).

7 Smith v. Ryan, 823 F.3d 1270 (9th Cir. 2016).

The retroactive application of an amended statute that requires the jury to determine whether a defendant should receive the death penalty following consideration of evidence in mitigation, does not violate the prohibition against ex post facto laws where the law in effect at the time of the crime did not prohibit the defendant from presenting mitigating evidence to the jury. State v. Langley, 363 Or. 482, 424 P.3d 688 (2018), opinion adhered to as modified on other grounds on reconsideration, 365 Or. 418, 446 P.3d 542 (2019).

8 People v. Buie, 298 Mich. App. 50, 825 N.W.2d 361 (2012).

9 Kowalski v. State, 426 P.3d 1148 (Alaska Ct. App. 2018).

10 Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); State v. Prine, 297 Kan. 460, 303 P.3d 662 (2013); State v. Rose, 425 N.J. Super. 463, 42 A.3d 172 (App. Div. 2012).

11 Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

12 U.S. v. Henson, 486 F.2d 1292 (D.C. Cir. 1973).

13 Splawn v. State of Cal., 431 U.S. 595, 97 S. Ct. 1987, 52 L. Ed. 2d 606 (1977); Beazell v. Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

14 Dunlap v. State, 159 Idaho 280, 360 P.3d 289 (2015).

15 U.S. v. Williams, 475 F.2d 355 (D.C. Cir. 1973).

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16B Am. Jur. 2d Constitutional Law § 712

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Constitutional Law
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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

a. In General

(1) General Considerations

§ 712. Nature and definition of bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1096

A.L.R. Library

Validity, Construction, and Application of Fair Treatment for Experienced Pilots Act (FTEPA), 49 U.S.C.A. s44729, 68 A.L.R. Fed. 2d 273

Trial Strategy

Proof of Discrimination Under Age Discrimination in Employment Act, 44 Am. Jur. Proof of Facts 3d 79

Forms

Forms relating to actions under Age Discrimination in Employment Act (ADEA), generally, see Am. Jur. Pleading and Practice Forms, Labor and Labor Relations [Westlaw®(r) Search Query]

A "bill of attainder" within the meaning of the Bill of Attainder Clause of the Constitution is a legislative act that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.[1] It is similarly held that a bill of attainder has three requirements: (1) specification of the affected persons, (2) punishment, and (3) lack of a judicial trial.[2] Some courts apply three general tests to determine whether a statutory provision qualifies as a prohibited bill of attainder: (1) a "historical" test that looks to traditional forms of legislative punishment, (2) a "functional" test that looks to the purposes served by the bill, and (3) a "motivational" test that looks to actual legislative motives.[3]

The Federal Constitution contains a prohibition against the enactment of bills of attainder by Congress[4] and also by the states.[5] When the Bill of Attainder Clause applicable to the states is being interpreted, the court's concern for the independent operation of each of the branches of government must be tempered by a concern about preserving to the states the choice of government structures.[6] Additionally, in some states, provisions in the state constitution also ban bills of attainder, and these bans have been held applicable to any form of legislative action, including direct action by the people.[7]

Practice Tip:

A state constitutional provision prohibiting bills of attainder is not interpreted more expansively than its federal counterpart.[8] Also, in analyzing a bill alleged to be an attainder, relevant precedents under the Federal Constitution's Bill of Attainder Clause proscribing the federal government from passing a bill of attainder and under a state constitution's clause proscribing a state from passing a bill of attainder generally may be used interchangeably.[9]

Only the clearest proof can suffice to establish the unconstitutionality of a statute on the ground that it constitutes a bill of attainder.[10]

Observation:

The constitutional prohibition against bills of attainder was intended to serve as a general safeguard against the legislative exercise of a judicial function or, more simply, trial by legislature.[11] The Bill of Attainder Clause also implements the doctrine of separation of powers.[12] However, the prohibition against bills of attainder was not intended as a narrow, technical (and therefore soon to be outmoded) prohibition,[13] nor was it intended to serve as a variant of the equal protection doctrine, invalidating statutes that legislatively burden some persons or groups but not all other plausible individuals;[14] the prohibition limits Congress to the choice of legislating for the universe, legislating only benefits, or not legislating at all.[15]

Footnotes

1 Ahjam v. Obama, 37 F. Supp. 3d 273 (D.D.C. 2014); Brown v. Montoya, 45 F. Supp. 3d 1294 (D.N.M. 2014); Law School Admission Council, Inc. v. State of California, 222 Cal. App. 4th 1265, 166 Cal. Rptr. 3d 647, 300 Ed. Law Rep. 997 (3d Dist. 2014), as modified, (Feb. 11, 2014); Cook v. Smith, 288 Ga. 409, 705 S.E.2d 847, 264 Ed. Law Rep. 897 (2010); Zivkovic v. State, 150 Idaho 783, 251 P.3d 611 (Ct. App. 2011).
As to the specificity requirement, see § 717.
As to the nonjudicial infliction of punishment, see §§ 715, 716.
A "bill of attainder" is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); Hettinga v. U.S., 677 F.3d 471 (D.C. Cir. 2012); Reynolds v. Arnone, 402 F. Supp. 3d 3 (D. Conn. 2019); Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299 (M.D. Fla. 2014); Durham v. Martin, 388 F. Supp. 3d 919 (M.D. Tenn. 2019), aff'd, 789 Fed. Appx. 533 (6th Cir. 2020); Kovac v. Wray, 363 F. Supp. 3d 721 (N.D. Tex. 2019).

2 Hamad v. Gates, 732 F.3d 990 (9th Cir. 2013); Hettinga v. U.S., 677 F.3d 471 (D.C. Cir. 2012); Planned Parenthood of Cent. North Carolina v. Cansler, 877 F. Supp. 2d 310 (M.D. N.C. 2012); Club Gallistico de Puerto Rico Inc. v. United States, 414 F. Supp. 3d 191 (D.P.R. 2019); Durham v. Martin, 388 F. Supp. 3d 919 (M.D. Tenn. 2019), aff'd, 789 Fed. Appx. 533 (6th Cir. 2020); Budd v. State, 935 N.E.2d 746 (Ind. Ct. App. 2010), adhered to on reh'g, 937 N.E.2d 867 (Ind. Ct. App. 2010); In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011).

3 Ameur v. Gates, 759 F.3d 317 (4th Cir. 2014); Reynolds v. Arnone, 402 F. Supp. 3d 3 (D. Conn. 2019).

4 U.S. Const. Art. I, § 9, cl. 3, which applies solely to the federal government.

5 No State shall pass any Bill of Attainder. U.S. Const. Art. I, § 10, cl. 1.

6 Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338 (2d Cir. 2002).

7 State v. Thorne, 129 Wash. 2d 736, 921 P.2d 514 (1996).

8 Attorney General v. Michigan Public Service Com'n, 249 Mich. App. 424, 642 N.W.2d 691 (2002).

9 Kerr-McGee Chemical Corp. v. Edgar, 837 F. Supp. 927 (N.D. Ill. 1993).

10 Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); Ameur v. Gates, 759 F.3d 317 (4th Cir. 2014); In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011).

11 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); Foretich v. U.S., 351 F.3d 1198 (D.C. Cir. 2003); Neelley v. Walker, 67 F. Supp. 3d 1319 (M.D. Ala. 2014); In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011); Robinson v. Crown Cork & Seal Co., Inc., 335 S.W.3d 126 (Tex. 2010).

12 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); Neelley v. Walker, 67 F. Supp. 3d 1319 (M.D. Ala. 2014); Hogan v. Department of Children and Families, 290 Conn. 545, 964 A.2d 1213 (2009); Robinson v. Crown Cork & Seal Co., Inc., 335 S.W.3d 126 (Tex. 2010).

The Bill of Attainder Clause should be viewed as necessary to the effective separation of powers. Durham v. Martin, 388 F. Supp. 3d 919 (M.D. Tenn. 2019), aff'd, 789 Fed. Appx. 533 (6th Cir. 2020).

Statutes, which set forth a generally applicable rule and leave to the courts and juries the job of deciding what persons have committed the specified acts, do not constitute bills of attainder. Zivkovic v. State, 150 Idaho 783, 251 P.3d 611 (Ct. App. 2011).

13 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); Robinson v. Crown Cork & Seal Co., Inc., 335 S.W.3d 126 (Tex. 2010).

14 Perez v. County of Monterey, 32 Cal. App. 5th 257, 243 Cal. Rptr. 3d 683 (6th Dist. 2019).

15 New Jersey Ass'n of Health Plans v. Farmer, 342 N.J. Super. 536, 777 A.2d 385 (Ch. Div. 2000).

Equal protection, generally, see §§ 817 to 932.

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16B Am. Jur. 2d Constitutional Law § 713

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

a. In General

(1) General Considerations

§ 713. Applicability of bill of attainder to various enactments and persons

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1096, 1099

Pursuant to the constitutional prohibition against bills of attainder, legislative bodies must accomplish their objectives by rules of general applicability and cannot specify the people upon whom the sanction it prescribes is to be levied.[1] When past activity serves as a point of reference for the ascertainment of particular persons ineluctably designated by a legislature for punishment, the legislative enactment may be an "attainder."[2] Additionally, the federal prohibition against bills of attainder applies to legislative acts only and not to regulatory actions of administrative agencies.[3]

The Bill of Attainder Clause is a limitation on the authority of the legislative branch[4] and is not applicable to the executive branch,[5] nor can it be invoked on behalf of a state.[6]

The protection afforded by the Bill of Attainder Clause is not a purely personal guarantee and therefore is one of the constitutional rights enjoyed by corporations.[7] However, actions may be considered punitive for purposes of the Bill of Attainder Clause if taken against an individual, but not if taken against a corporation.[8]

The constitutional prohibition against the passage of bills of attainder may be successfully invoked by noncitizens;[9] however, a statute requiring deportation of persons shown to have participated in Nazi persecution during World War II is not a bill of

attainder because deportation is not considered to be punishment.[10] Additionally, an amended immigration regulation, depriving an immigration judge (IJ) of jurisdiction to adjudicate adjustment of status applications filed by arriving aliens and instead requiring arriving aliens in removal proceedings to file such applications with the United States Citizenship and Immigration Service (USCIS), was not a bill of attainder; even if the Bill of Attainder Clause applied to executive branch regulations, the regulation was not a generally applicable jurisdictional rule since it did not single out any individual or group and did not impose punishment of any kind.[11]

Footnotes

1 Planned Parenthood of Central North Carolina v. Cansler, 804 F. Supp. 2d 482 (M.D. N.C. 2011).

2 State v. Palmer, 257 Neb. 702, 600 N.W.2d 756 (1999).

3 Kadi v. Geithner, 42 F. Supp. 3d 1 (D.D.C. 2012); Doe v. Poritz, 142 N.J. 1, 662 A.2d 367, 36 A.L.R.5th 711 (1995).

Members of the Texas Medical Board cannot be held to have violated the Bill of Attainder Clause in their individual capacities. Rivera v. Kalafut, 456 Fed. Appx. 325 (5th Cir. 2011).

A city council order concerning the use of the city's public access cable television channel by a private producer of a television show was not the equivalent to a legislative act and thus was not an unlawful "bill of attainder." LaFortune v. City Of Biddeford, 142 Fed. Appx. 471 (1st Cir. 2005).

4 State v. Manussier, 129 Wash. 2d 652, 921 P.2d 473 (1996).

5 Korte v. Office of Personnel Management, 797 F.2d 967 (Fed. Cir. 1986).

6 Nuclear Energy Institute, Inc. v. Environmental Protection Agency, 373 F.3d 1251 (D.C. Cir. 2004).

7 Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338 (2d Cir. 2002).

8 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010).

9 Mendelsohn v. Meese, 695 F. Supp. 1474 (S.D. N.Y. 1988).

10 Linnas v. I.N.S., 790 F.2d 1024 (2d Cir. 1986); Schellong v. U.S. I.N.S., 805 F.2d 655, 91 A.L.R. Fed. 747 (7th Cir. 1986).

11 Scheerer v. U.S. Atty. Gen., 513 F.3d 1244 (11th Cir. 2008).

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16B Am. Jur. 2d Constitutional Law § 714

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

a. In General

(1) General Considerations

§ 714. Bills of pains and penalties as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1096, 1097

Within the meaning of the Constitution, prohibited bills of attainder include bills of pains and penalties.[1] Indeed, the bill of attainder formulation has been interpreted to apply where the legislature enacts bills of "pains and penalties," which inflict punishments other than execution.[2]

Footnotes

1 Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965); Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960); ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739 (2005).

2 Martin v. Houston, 176 F. Supp. 3d 1286 (M.D. Ala. 2016); U.S. v. Lovett, 106 Ct. Cl. 856, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946); Yocum v. Greenbriar Nursing Home, 2005 OK 27, 130 P.3d 213 (Okla. 2005).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

a. In General

(2) Nonjudicial Infliction of Punishment and Specificity

§ 715. Nonjudicial infliction of punishment as element of bill of attainder; lack of trial

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1097

Two elements of what constitutes a bill of attainder prohibited by the Constitution are the presence of punishment which, as to a particular law, provision, or action challenged on bill of attainder grounds, is inflicted by an authority other than a judicial authority[1] and the lack of a judicial trial.[2] Thus, the Bill of Attainder Clause reflects the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.[3]

Footnotes

1 Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984); U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965); WMX Technologies, Inc. v. Gasconade County, Mo., 105 F.3d 1195 (8th Cir. 1997); Petition of Quechee Service Co., Inc., 166 Vt. 50, 690 A.2d 354 (1996).
Constitutional prohibitions on bills of attainder prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L.

Ed. 2d 463 (2016); Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); Robinson v. Crown Cork & Seal Co., Inc., 335 S.W.3d 126 (Tex. 2010).

2 Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); Neelley v. Walker, 67 F. Supp. 3d 1319 (M.D. Ala. 2014); Ferreira v. Town of East Hampton, 56 F. Supp. 3d 211 (E.D. N.Y. 2014); Durham v. Martin, 388 F. Supp. 3d 919 (M.D. Tenn. 2019), aff'd, 789 Fed. Appx. 533 (6th Cir. 2020); Doe v. Anderson, 2015 ME 3, 108 A.3d 378 (Me. 2015).

3 Kovac v. Wray, 363 F. Supp. 3d 721 (N.D. Tex. 2019).

The prohibition against bills of attainder forbids the imposition of punishment by the legislature on specific persons. In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011).

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16B Am. Jur. 2d Constitutional Law § 716

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

a. In General

(2) Nonjudicial Infliction of Punishment and Specificity

§ 716. Punitive nature of legislation as element establishing bill of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1097

Unless an enactment is punitive in its purpose and effect, there is no bill of attainder.[1] However, the mere fact that harm is inflicted by the government does not make it punishment within the proscription against bills of attainder; there may be reasons other than punishment for a deprivation.[2] To be punishment, the purpose of the burden must be retribution for past events or the deterrence of future misconduct.[3] Legislative acts are not bills of attainder merely because they compel an individual or defined group to bear unpopular burdens.[4] Indeed, a statute reasonably can be said to further nonpunitive legislative purposes, as a factor weighing against finding that a statute is an unconstitutional bill of attainder, if the statute has a legitimate nonpunitive purpose and there is a rational connection between the burden imposed and the nonpunitive purposes.[5] Moreover, the legislature's withholding of appropriations does not constitute a traditional form of punishment that is considered to be punitive per se.[6] Bill of attainder provisions apply only in those situations in which the injury complained of constitutes an imposition or exaction of a criminal rather than of a civil nature.[7] Thus, the concept of legislative punishment encompasses penalties such as imprisonment, banishment, the punitive confiscation of property by the sovereign and legislative enactments barring designated individuals or groups from participation in specified employments or vocations.[8]

In determining whether the effects of a civil law are so punitive as to override the legislature's stated civil intent, so as to constitute an unconstitutional bill of attainder, a court considers: (1) whether the sanction involves an affirmative disability or

restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.[9]

Practice Tip:

Whether a particular punishment is criminal or civil in nature, for bill of attainder purposes, is at least initially a matter of statutory construction.[10] The existence of punishment is also dependent upon the circumstances of individual cases,[11] and only the clearest proof will suffice to override legislative intent and to transform what was intended as a civil remedy into a criminal penalty, for bill of attainder purposes.[12]

To decide whether a statute imposes punishment as required for it to qualify as a bill of attainder, a court should conduct a three-part inquiry and consider (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a legislative intent to punish;[13] each of these criteria is an independent, though not necessarily decisive, indicator of punitiveness.[14] In considering whether the legislative record evinces an intent to punish, courts examine legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation to determine if there is unmistakable evidence of punitive intent.[15] It is not the severity of a statutory burden that demonstrates punitiveness[16] so much as the magnitude of the burden relative to the purported nonpunitive purposes of the statute.[17] Where Congress enacted a statute not to impose any particular punishment on a specified group, and there is no evidence that Congress had a punitive intent,[18] much less unmistakable evidence of punitive intent,[19] the statute does not constitute a bill of attainder. If a statute furthers a nonpunitive legislative purpose, it is not a "bill of attainder," even if it singles out an individual on the basis of irreversible past conduct,[20] and a smattering of, or several isolated, statements are not sufficient to evince punitive intent on the part of the legislature for the purpose of the claim that the statute is an unlawful bill of attainder.[21] In determining whether a statute challenged as a bill of attainder inflicts punishment, a court considers whether less burdensome alternatives would have achieved the same nonpunitive purpose.[22]

Observation:

Outright statements of punitive intent are not necessary in determining whether the legislative record evinces a congressional intent to punish; instead, the court of appeals looks for evidence permitting an inference of punitive intent.[23] Moreover, a departure from established legislative procedures may suggest an improper legislative purpose.[24]

As to general classes of sanctions or burdens, there is authority indicating that for bill of attainder purposes, the sanction of corruption of blood, namely, a bar on an individual's receiving or transmitting property, constitutes punishment,[25] as does the deprivation of political or civil rights.[26] The punishment element of a constitutionally prohibited bill of attainder is not restricted purely to retribution for past events but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his or her future misconduct; such a view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect.[27]

Footnotes

1 In re McEvoy, 267 Mich. App. 55, 704 N.W.2d 78, 202 Ed. Law Rep. 778 (2005).
The proscription against bills of attainder reaches only statutes that inflict punishment. Adams v. U.S., 796 F. Supp. 2d 67 (D.D.C. 2011), aff'd, 720 F.3d 915 (D.C. Cir. 2013).

2 In re McEvoy, 267 Mich. App. 55, 704 N.W.2d 78, 202 Ed. Law Rep. 778 (2005).

3 Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez, 174 F. Supp. 3d 585 (D.P.R. 2016), aff'd, 834 F.3d 110 (1st Cir. 2016).

4 World Wide Video of Washington, Inc. v. City of Spokane, 125 Wash. App. 289, 103 P.3d 1265 (Div. 3 2005).
Under the Bill of Attainder Clause, a punishment is something more than a burden. Kaspersky Lab, Inc. v. United States Department of Homeland Security, 909 F.3d 446 (D.C. Cir. 2018).
The mere imposition of burdens on citizens by legislation does not constitute punishment prohibited by the Bill of Attainder Clause. Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez, 174 F. Supp. 3d 585 (D.P.R. 2016), aff'd, 834 F.3d 110 (1st Cir. 2016); Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 39 A.3d 228 (App. Div. 2012), also published at, 26 N.J. Tax 575, 2012 WL 3711188 (Super. Ct. App. Div. 2012).

5 Patchak v. Jewell, 828 F.3d 995 (D.C. Cir. 2016), aff'd, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018).

6 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010).

7 Myrie v. Commissioner, N.J. Dept. of Corrections, 267 F.3d 251 (3d Cir. 2001).
Military detention is not "punishment" for purposes of the Bill of Attainder Clause. Ahjam v. Obama, 37 F. Supp. 3d 273 (D.D.C. 2014).

8 Hamad v. Gates, 732 F.3d 990 (9th Cir. 2013); Reynolds v. Arnone, 402 F. Supp. 3d 3 (D. Conn. 2019).

9 Doe v. Anderson, 2015 ME 3, 108 A.3d 378 (Me. 2015).

10 Myrie v. Commissioner, N.J. Dept. of Corrections, 267 F.3d 251 (3d Cir. 2001).

11 Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951).

12 Myrie v. Commissioner, N.J. Dept. of Corrections, 267 F.3d 251 (3d Cir. 2001).

13 Kaspersky Lab, Inc. v. United States Department of Homeland Security, 909 F.3d 446 (D.C. Cir. 2018); Center for Powell Crossing, LLC v. City of Powell, Ohio, 173 F. Supp. 3d 639 (S.D. Ohio 2016); South Carolina Electric & Gas Company v. Randall, 333 F. Supp. 3d 552 (D.S.C. 2018), appeal dismissed, 2018 WL 7203223 (4th Cir. 2018); Garozzo v. Missouri Dept. of Ins., Financial Institutions & Professional Registration, Div. of Finance, 389 S.W.3d 660 (Mo. 2013); Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 39 A.3d 228 (App. Div. 2012), also published at, 26 N.J. Tax 575, 2012 WL 3711188 (Super. Ct. App. Div. 2012); Eagleman v. Diocese of Rapid City, 2015 SD 22, 862 N.W.2d 839 (S.D. 2015).

14 Foretich v. U.S., 351 F.3d 1198 (D.C. Cir. 2003).

15 Eagleman v. Diocese of Rapid City, 2015 SD 22, 862 N.W.2d 839 (S.D. 2015).

16 Kaspersky Lab, Inc. v. United States Department of Homeland Security, 909 F.3d 446 (D.C. Cir. 2018).

17 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010).

18 Hamad v. Gates, 732 F.3d 990 (9th Cir. 2013).

19 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); Hamad v. Gates, 732 F.3d 990 (9th Cir. 2013).

20 Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006).

21 Kaspersky Lab, Inc. v. United States Department of Homeland Security, 909 F.3d 446 (D.C. Cir. 2018); Reynolds v. Arnone, 402 F. Supp. 3d 3 (D. Conn. 2019).

22 Reynolds v. Arnone, 402 F. Supp. 3d 3 (D. Conn. 2019).

23 Fowler Packing Company, Inc. v. Lanier, 844 F.3d 809 (9th Cir. 2016).

24 SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662 (9th Cir. 2002).

25 Morrisey v. Ferguson, 156 Ariz. 536, 753 P.2d 1192 (Ct. App. Div. 2 1988).

26 Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960); Ullmann v. U.S., 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511, 53 A.L.R.2d 1008 (1956).

27 Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984); Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

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16B Am. Jur. 2d Constitutional Law § 717

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

a. In General

(2) Nonjudicial Infliction of Punishment and Specificity

§ 717. Element of specificity in legislation targeting individual or group as constituting bill of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1098

One of the definitional elements of what constitutes a bill of attainder prohibited by the Constitution is the element of specificity, that is, the singling out or designation of an individual, a narrow class of persons, or an ascertainable group.[1] The fact that a bill of attainder may be addressed to a group or a class rather than to an individual does not prevent it from being considered a bill of attainder.[2] On the other hand, if a law merely designates a properly general characteristic and then imposes upon all who have that characteristic a remedial measure reasonably calculated to achieve a nonpunitive purpose, there is no attainder.[3]

In the context of a challenge under the bill of attainder clause, a statute need not identify an individual or group by name to incur suspicion.[4] Indeed, a constitutionally prohibited bill of attainder need not expressly name its target; some bills of attainder simply describe them.[5] The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons;[6] however, if an affected group can escape the regulation by altering its conduct, the proscription is not a "bill of attainder."[7] Moreover, a law may be so specific as to create a legitimate class of one without amounting to a bill of attainder,[8] and the party challenging a congressional law as an unconstitutional bill of attainder bears the burden of proof.[9]

Indeed, while a law may not be directed at an identifiable individual, a law does not automatically violate the prohibition on bills of attainder by referring to an individual.[10]

In regard to the relationship of underinclusiveness to specificity, the mere fact that an enactment focuses upon one or a few out of many of what can be viewed as a class does not necessarily result in specificity, and that underinclusiveness is not a necessary feature of a bill of attainder.[11] Although the Supreme Court has noted, with regard to the specificity element, that shorthand phrases may be used in summarizing characteristics with which an enactment is concerned without there being a violation of the bill of attainder prohibition, it also has been recognized that such shorthand phrases must not be overbroad.[12]

A statute that singles out individuals or groups by targeting their property may be a bill of attainder.[13]

Footnotes

1 Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984); Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); Kaspersky Lab, Inc. v. United States Department of Homeland Security, 311 F. Supp. 3d 187 (D.D.C. 2018), aff'd, 909 F.3d 446 (D.C. Cir. 2018); Planned Parenthood of Cent. North Carolina v. Cansler, 877 F. Supp. 2d 310 (M.D. N.C. 2012); Armijo v. Miles, 127 Cal. App. 4th 1405, 26 Cal. Rptr. 3d 623 (2d Dist. 2005).
In its contemporary usage, the Bill of Attainder Clause prohibits any law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); Adams v. U.S., 796 F. Supp. 2d 67 (D.D.C. 2011), aff'd, 720 F.3d 915 (D.C. Cir. 2013); Avera v. United Air Lines, 686 F. Supp. 2d 1262 (N.D. Fla. 2010), aff'd, 465 Fed. Appx. 855 (11th Cir. 2012); Kovac v. Wray, 363 F. Supp. 3d 721 (N.D. Tex. 2019).

2 U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
A state statutory provision categorically banning adoption by gays and lesbians is unconstitutional on its face under the Florida constitutional provision prohibiting bills of attainder; the singular purpose of enacting the statutory provision was to repress gay Floridians as a group. In re Adoption of Doe, 2008 WL 5070056 (Fla. Cir. Ct. 2008).

3 Franceschi v. Yee, 887 F.3d 927 (9th Cir. 2018), cert. denied, 139 S. Ct. 648, 202 L. Ed. 2d 493 (2018).

4 SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662 (9th Cir. 2002).

5 Hettinga v. U.S., 677 F.3d 471 (D.C. Cir. 2012).

6 SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662 (9th Cir. 2002); Perez v. County of Monterey, 32 Cal. App. 5th 257, 243 Cal. Rptr. 3d 683 (6th Dist. 2019).
The element of specificity for a bill of attainder is not established by proof that a statute merely imposes punishment on some persons or groups, but also requires proof that certain persons or groups are selected based on their irreversible prior conduct. Doe v. Anderson, 2015 ME 3, 108 A.3d 378 (Me. 2015).

7 Franceschi v. Yee, 887 F.3d 927 (9th Cir. 2018), cert. denied, 139 S. Ct. 648, 202 L. Ed. 2d 493 (2018); Council of Independent Tobacco Mfrs. of America v. State, 685 N.W.2d 467 (Minn. Ct. App. 2004), aff'd, 713 N.W.2d 300 (Minn. 2006).
Where no method of escaping the class is provided, there is a specificity element. Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006).

8 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010).

9 ACORN v. U.S., 618 F.3d 125, 62 A.L.R.6th 777 (2d Cir. 2010); Eagleman v. Diocese of Rapid City, 2015 SD 22, 862 N.W.2d 839 (S.D. 2015).

10 South Carolina Electric & Gas Company v. Randall, 333 F. Supp. 3d 552 (D.S.C. 2018), appeal dismissed, 2018 WL 7203223 (4th Cir. 2018).

11 Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

Since virtually all legislation operates by identifying the characteristics of the class benefited or burdened, the mere fact that the "class" currently happens to contain only one member does not transform an open-ended statute into a constitutionally prohibited bill of attainder. Hettinga v. U.S., 677 F.3d 471 (D.C. Cir. 2012).

12 U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

13 SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662 (9th Cir. 2002).

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16B Am. Jur. 2d Constitutional Law § 718

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 718. Statutes governing communism, subversion, and activities against the government as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(1)

It has been held that a federal statute (since repealed) aimed at the control of subversive activities and requiring registration of "Communist-action" organizations with the United States Attorney General did not constitute an unconstitutional bill of attainder whereas the statute, although intended to reach the operations of the Communist Party, did not attach to any specified organization but rather to described activities in which an organization might or might not engage.[1] Likewise, a rule under which an applicant was denied admission to a state's bar for declining to answer questions relating to membership in the Communist Party has been upheld against the contention that the rule violated the prohibition against bills of attainder.[2] However, a provision of a federal labor statute making it a crime for a communist to serve as an officer or employee of a labor union has been struck down as a bill of attainder.[3]

Some enactments, dating from the time of the Civil War or Reconstruction, setting forth loyalty oath requirements have been ruled by the United States Supreme Court to be bills of attainder,[4] but other enactments setting forth loyalty oath requirements have been held not to constitute bills of attainder on the basis that the punishment element of a bill of attainder was not present.[5]

An indictment charging defendants with providing material support to a designated foreign terrorist organization does not present a bill of attainder, despite the Secretary of State's later redesignation of the organization as such, where the defendants'

alleged conduct occurred when the prior foreign terrorist organization designations were in effect.[6] Moreover, an executive order pursuant to the International Emergency Economic Powers Act allowing the Office of Foreign Assets Control to block assets of those individuals it names as specifically designated global terrorists is not a bill of attainder because the bill of attainder clause does not apply to acts taken by a regulatory agency, and neither the designation of a person as a specifically designated global terrorist nor the blocking of assets constitutes punishment.[7]

Footnotes

1 Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961).

2 Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

3 U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

4 Cummings v. Missouri, 71 U.S. 277, 18 L. Ed. 356, 1866 WL 9452 (1866).

5 Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951); American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950); State v. Hamilton, 92 Ohio App. 285, 49 Ohio Op. 360, 65 Ohio L. Abs. 438, 110 N.E.2d 37 (7th Dist. Mahoning County 1951); Huntamer v. Coe, 40 Wash. 2d 767, 246 P.2d 489 (1952).

6 U.S. v. Afshari, 635 F. Supp. 2d 1110 (C.D. Cal. 2009).

7 Kadi v. Geithner, 42 F. Supp. 3d 1 (D.D.C. 2012).

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16B Am. Jur. 2d Constitutional Law § 719

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Constitutional Law

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 719. Criminal laws as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(2)

A.L.R. Library

State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Constitutional Issues, 37 A.L.R.6th 55 (secs. 13, 14 superseded in part by Validity of State Sex Offender Registration Laws Under Equal Protection Guarantees, 93 A.L.R.6th 1)

Court's Duty to Advise Sex Offender as to Sex Offender Registration Consequences or Other Restrictions Arising from Plea of Guilty, or to Determine that Offender is Advised Thereof, 41 A.L.R.6th 141

State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Expungement, Stay or Deferral, Exceptions, Exemptions, and Waiver, 39 A.L.R.6th 577

State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Duty to Register, Requirements for Registration, and Procedural Matters, 38 A.L.R.6th 1

Validity, Construction, and Application of State Statutory Requirement that Person Convicted of Sexual Offense in Other Jurisdiction Register or Be Classified as Sexual Offender in Forum State, 34 A.L.R.6th 171

Validity, Construction, and Application of State Statutes Imposing Criminal Penalties for Failure to Register as Required Under Sex Offender or Other Criminal Registration Statutes, 33 A.L.R.6th 91

Validity, construction, and application of state statutes authorizing community notification of release of convicted sex offender, 78 A.L.R.5th 489

Recidivist criminal laws of the type commonly known as "three strikes" laws do not constitute bills of attainder[1] because they do not specify the persons sought to be punished or identify them by past conduct and because a judicial sentencing hearing is necessary to determine the existence of two prior "strike" offenses.[2] Also, a trial court's use of the defendant's prior convictions to enhance the sentence for the defendant's instant offenses under a three strikes law does not violate constitutional strictures dealing with bills of attainder.[3]

The fact that a restitution order is intended to cause "financial pain" does not transform the restitution order into a primarily penal sanction within the proscription against bills of attainder.[4]

The crime-against-nature statute and statutes extending its effects did not constitute bills of attainder in an action challenging the constitutionality of the crime-against-nature statute; the statutes did not apply to easily ascertainable groups but rather applied to everyone who engaged in the proscribed conduct.[5] The bill of attainder clause is not implicated with respect to a capital-murder defendant's claim that a new death penalty statute, under which he was to be resentenced, constituted a bill of attainder, in that the legislation targeted an easily ascertainable group, i.e., those convicted of first-degree murder and subject to penalty of death, as the death penalty was not imposed upon the defendant without the benefit of a trial.[6] Where the defendant is sentenced to death before the legislature repeals the death penalty, if such repeal is suspended before it takes effect by the filing of a referendum petition appearing to have sufficient signatures, thus staying the repeal, the referendum does not reimpose the death penalty and does not constitute an unconstitutional bill of attainder, there being no change in the defendant's original death sentence.[7] However, a statutory amendment passed after the Governor commuted the defendant's death sentence to life imprisonment, retroactively providing that any person whose death sentence had been commuted was not eligible for parole, constitutes a bill of attainder where the amendment identifies the inmate and designates her as the subject of its retroactive application, although not specifically naming the inmate, it would inherently impose greater punishment on the inmate and does not further nonpunitive legislative purposes, the parole board members identify no legal process that may have existed to do properly what the legislature apparently intended to do, and the inmate did not receive any comparable form of process before her punishment was legislatively enhanced decades after her conviction, even though the statute did not deprive the inmate of a judicial trial to determine her guilt.[8]

A State Sex Offender Registration and Notification Act, which does not inflict punishment and serves a valid nonpunitive civil regulatory purpose, cannot, by definition, constitute a prohibited bill of attainder.[9] A state statute that requires certain inmates to undergo sex offender counseling while incarcerated is also not an impermissible bills of attainder where the legislature has not determined guilt, rather, it has merely imposed burdens on those whom the judicial branch had already found guilty.[10] However, as to offenders who were not sentenced to comply with registration when the act requiring registration was part of sentencing but who were subsequently subjected to registration when their earlier offenses were added to statutory list of sex offenses and registration was removed from sentencing, such act constitutes a bill of attainder.[11] Sexual predator designation statutes do not constitute an unconstitutional bill of attainder;[12] the statutes do not inflict punishment;[13] a judicial hearing is conducted before the sex offender is classified as a sexual predator; and the statutes do not apply to an identifiable individual.[14] Finally, the residency restriction of a sex offender registry statute,[15] such as a statute prohibiting a sex offender from living within a certain distance of designated locations, is not an illegal bill of attainder.[16] However, where a statute prohibits registered sex offenders in a county from establishing residency in the same home or on the same property, a pastor states a plausible claim that this is an unconstitutional bill of attainder by alleging that the state enacted the statute for the specific purpose of interfering with

his ministry to sex offenders, that the statute does not affect any other person, that it allows similar, nonreligious sex offender clusters to exist in every other county in the state where the registrants are related, and that the district attorney indicates that it would seek fines for public nuisance if he did not dismantle the settlement by a specific date.[17]

An amendment to capital sentencing procedures, requiring that a jury, rather than a sentencing judge, determine the existence or absence of aggravating circumstances rendering a defendant eligible for the death penalty is not a bill of attainder even if the particular timing of the amendment was spurred by the killing of five victims during an attempted bank robbery in which the defendant participated, because the statute does not focus on any particular person, but is properly focused on prohibited conduct applicable equally to everyone.[18]

An amended criminal discovery procedure for criminal cases is not an unconstitutional bill of attainder where the amendments do not impose punishment on specific persons or on a class of persons without any judicial proceeding.[19]

Forfeiture statutes are not bills of attainder, where the statutes creating the forfeiture procedure indicate a judicial trial occurs prior to the court ordering the person to forfeit her property.[20]

Footnotes

1 State v. Manussier, 129 Wash. 2d 652, 921 P.2d 473 (1996).

2 State v. Thorne, 129 Wash. 2d 736, 921 P.2d 514 (1996).

3 Sanchez v. Hedgpeth, 706 F. Supp. 2d 963 (C.D. Cal. 2010).

4 In re McEvoy, 267 Mich. App. 55, 704 N.W.2d 78, 202 Ed. Law Rep. 778 (2005).

5 Louisiana Electorate of Gays and Lesbians, Inc. v. State, 833 So. 2d 1016 (La. Ct. App. 4th Cir. 2002).

6 State v. Lovelace, 140 Idaho 53, 90 P.3d 278 (2003), on reh'g, 140 Idaho 73, 90 P.3d 298 (2004).
Methods of execution in capital punishment cases, see § 720.

7 State v. Torres, 304 Neb. 753, 936 N.W.2d 730 (2020).

8 Neelley v. Walker, 67 F. Supp. 3d 1319 (M.D. Ala. 2014).

9 Brown v. Montoya, 45 F. Supp. 3d 1294 (D.N.M. 2014).

10 In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011).

11 Doe v. Anderson, 2015 ME 3, 108 A.3d 378 (Me. 2015).

12 Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006); Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006); State v. Lockney, 2004-Ohio-1846, 2004 WL 765221 (Ohio Ct. App. 11th Dist. Trumbull County 2004); In re Commitment of Miller, 262 S.W.3d 877 (Tex. App. Beaumont 2008).
Parole for sex offenders, see § 721.

13 Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006); Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006); In re Commitment of Miller, 262 S.W.3d 877 (Tex. App. Beaumont 2008).

14 State v. Lockney, 2004-Ohio-1846, 2004 WL 765221 (Ohio Ct. App. 11th Dist. Trumbull County 2004).

15 Wright v. Iowa Dept. of Corrections, 747 N.W.2d 213 (Iowa 2008).

16 Formaro v. Polk County, 773 N.W.2d 834 (Iowa 2009).

17 Martin v. Houston, 176 F. Supp. 3d 1286 (M.D. Ala. 2016) (also holding that the legislative action admitted of no legitimate, nonpunitive purpose).

18 State v. Galindo, 278 Neb. 599, 774 N.W.2d 190 (2009).

19 Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007).

20 $100 v. State, 822 N.E.2d 1001 (Ind. Ct. App. 2005).

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16B Am. Jur. 2d Constitutional Law § 720

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 720. Methods of execution in capital punishment cases as constituting bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(3)

The Department of Justice's lethal injection regulations, governing the procedure for execution of federal offenders, did not constitute an unconstitutional bill of attainder where the defendant had been tried in court, convicted and sentenced to death by jury, and the regulations were merely procedures for carrying out punishment which did not determine either his guilt or degree of his punishment.[1] The federal death penalty statute for persons who kill during the course of specified offenses, by allowing the government to identify and prove nonstatutory aggravating factors, is not an unconstitutional bill of attainder.[2]

A state statute which provided an optional provision for death by lethal injection at the election of the defendant in addition to a previously mandated death by hanging was not, as a result, an unconstitutional "bill of attainder," as death by lethal injection was not a legislatively created punishment but a sentence of death.[3]

Footnotes

1 U.S. v. Chandler, 950 F. Supp. 1545 (N.D. Ala. 1996), aff'd, 218 F.3d 1305 (11th Cir. 2000).

2 U.S. v. DesAnges, 921 F. Supp. 349 (W.D. Va. 1996).

3 State v. Fitzpatrick, 211 Mont. 341, 684 P.2d 1112 (1984).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 721. Parole, probation, registration, and supervised release rules and regulations as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(4), 1100(5)

Parole statutes do not amount to an unconstitutional bill of attainder where the statutes are not created to inflict new punishment on a parolee or on any group to which he belonged.[1] An inmate's objection to the parole board's decision, that it was in contravention of the controlling legislative enactment, shows an executive adjudication, not a legislative enactment, and therefore the proscription against bills of attainder is inapplicable. Also, incarceration following the discretionary denial of parole is not a new punishment meted out by the parole board. It simply continues the punishment previously imposed by the sentencing court.[2] A conditional release program is not bill of attainder given that it does not punish specific individuals for acts already committed, but rather it provides for postprison supervision for certain types of repeat offenders who commit certain new crimes.[3]

A state statute which provides for the collection of blood and saliva specimens from certain convicted felons for use in preparing "genetic marker groupings," primarily DNA analysis, to detect and deter the commission of crimes by recidivists is not an unconstitutional bill of attainder as imposing an additional punishment while not affording an opportunity to be heard; the minimal intrusion imposed incident to the statute does not result in punishment, and notice inheres in the legislative process by which the statute was enacted.[4] Also, a statute providing that persons convicted of certain sex crimes or determined to be sexually dangerous persons cannot be paroled except on the recommendation of a psychiatrist is not an unconstitutional bill of attainder.[5] An amendment to a state statute governing a sexual offender program, requiring prisoners to "successfully complete"

a program to be entitled to parole, is not a bill of attainder; the statute applies only to persons who have already been convicted of sex offenses.[6]

State statutes and regulation imposing a monthly supervision fee on parolees did not violate the bill of attainder clause; the statutes and regulation were not punitive in nature but reasonably served a legitimate nonpunitive legislative purpose.[7]

A governor's alleged no-parole policy for inmates convicted of murder does not support a state inmate's claim alleging an unconstitutional bill of attainder.[8]

CUMULATIVE SUPPLEMENT

Cases:

Statute providing parole eligibility for defendants who were juveniles at time of offense and were affected by *Miller v. Alabama*, precluding sentences of life without parole for such defendants unless they fell within small group eligible for such sentence, was not a bill of attainder; statute did not inflict punishment on anyone. Mo. Ann. Stat. § 558.047. Hicklin v. Schmitt, 613 S.W.3d 780 (Mo. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Johnson v. Voinovich, 49 Fed. Appx. 1 (6th Cir. 2002).
Parole, generally, see Am. Jur. 2d, Pardon and Parole §§ 72 to 126.

2 Diaz v. Lampela, 601 Fed. Appx. 670 (10th Cir. 2015).

3 Mayes v. Moore, 827 So. 2d 967 (Fla. 2002).

4 Vanderlinden v. State of Kan., 874 F. Supp. 1210 (D. Kan. 1995), judgment aff'd, 103 F.3d 940 (10th Cir. 1996).

5 State v. Gee, 107 Idaho 991, 695 P.2d 376 (1985).
Registration and other requirements for sex offenders, see § 719.

6 Schafer v. Moore, 46 F.3d 43 (8th Cir. 1995).

7 Taylor v. Sebelius, 189 Fed. Appx. 752 (10th Cir. 2006).

8 DeHaven v. Schwarzenegger, 123 Fed. Appx. 287 (9th Cir. 2005).

16B Am. Jur. 2d Constitutional Law § 722

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 722. Prison rules and regulations as bills of attainder; suspension of benefits legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(3), 1100(5)

A.L.R. Library

Validity, construction, and effect of sec. 202(x) of Social Security Act (42 U.S.C.A. sec. 402(x)), mandating suspension of old-age, survivors, and disability insurance benefits for incarcerated felons, 86 A.L.R. Fed. 748

Neither a federal prisoner's disciplinary hearing, nor its result, could constitute a bill of attainder, since they are not legislative acts.[1] Disciplinary sanctions for prison rule violations are not within the constitutional prohibitions against bills of attainder where, at its most severe, the disciplinary process could not extend the sentence imposed by the court.[2] A statute authorizing restitution as a part of the prison disciplinary process did not violate an inmate's right of protection against bills of attainder as the statute authorized restitution as a sanction rather than a criminal penalty.[3] Likewise, a state inmate did not state a bill of attainder claim arising out of his security reclassification and transfer to a different institution by state correctional officials where he did not claim that the state officials enacted any rules for the purpose of punishing him without a judicial trial.[4] However, a state statute mandating that former death row inmates be placed under special circumstances high security status is an unconstitutional bill of attainder, where, prior to the passage of the statute, the 11 inmates sentenced to death during

the relevant time period were a known group, and the legislature specifically identified the group as the target of the statute during debate, the legislators described in detail the punitive nature of the proposed conditions the statute would impose on special circumstances inmates, the conditions of confinement set forth in the statute undoubtedly constituted a traditional form of punishment that was considered to be punitive per se, and the statute did not afford inmates a judicial proceeding.[5]

A law permitting prison officials to impose a $5 copayment on an inmate for medical visits is not bill of attainder; the law applied to all inmates in nonemergency medical situations who voluntarily sought medical treatment and had the funds to pay a nominal copayment, and the law did not inflict any punishment.[6]

A statute providing for suspension of Social Security Disability benefits to an individual who is confined in a penal institution and not participating in a rehabilitation program is constitutional and is not a bill of attainder.[7]

A statute which applies a 15% cap to the earned early release credits of Class A felony sex offenders, while other offenders receive a 33% reduction of their sentences, does not constitute a bill of attainder with respect to Class A felony sex offenders; the reduced cap on earned early release time does not increase or inflict punishment.[8] Also, a sentencing credit for prisoners who complete educational programs does not inflict punishment, where the court finds that the intent behind the educational credit time statute is to enhance rehabilitation by providing an incentive to further one's education while incarcerated.[9]

"Three strikes and you're out" provisions, requiring indigent prisoners who have filed three or more frivolous lawsuits in the past to prepay a filing fee to initiate any new lawsuit, are not "bills of attainder"; the statutes did not specify any particular individuals but rather applied to an entire group of prisoners and the statutes were procedural rather than punitive.[10]

Footnotes

1 Stanko v. Obama, 434 Fed. Appx. 63 (3d Cir. 2011).

2 Casteel v. Kolb, 176 Wis. 2d 440, 500 N.W.2d 400 (Ct. App. 1993).
Inmates' rights and conditions of incarceration, generally, see Am. Jur. 2d, Penal and Correctional Institutions §§ 22 to 105.

3 Burns v. Executive Director, Colorado Dept. of Corrections, 183 P.3d 695 (Colo. App. 2008).

4 Newell v. Brown, 981 F.2d 880 (6th Cir. 1992).

5 Reynolds v. Arnone, 402 F. Supp. 3d 3 (D. Conn. 2019).

6 Gardner v. Wilson, 959 F. Supp. 1224 (C.D. Cal. 1997).

7 Jensen v. Heckler, 766 F.2d 383 (8th Cir. 1985); Jones v. Heckler, 774 F.2d 997 (10th Cir. 1985); Andujar v. Bowen, 802 F.2d 404 (11th Cir. 1986).

8 In re Ramsey, 102 Wash. App. 567, 9 P.3d 231 (Div. 3 2000).

9 Budd v. State, 935 N.E.2d 746 (Ind. Ct. App. 2010), adhered to on reh'g, 937 N.E.2d 867 (Ind. Ct. App. 2010) (defendant argued that educational credit time was less favorable to him than under a prior version of the statute).

10 State ex rel. Tayr Kilaab al Ghashiyah (Khan) v. Sullivan, 2000 WI App 109, 235 Wis. 2d 260, 613 N.W.2d 203 (Ct. App. 2000).

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16B Am. Jur. 2d Constitutional Law § 723

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 723. Sentencing laws and guidelines as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(3)

The Sentencing Reform Act and the United States Sentencing Guidelines are not unconstitutional bills of attainder simply because they permit courts to impose increased punishments because of relevant conduct; the Act and guidelines do not specifically single out any one individual for increased punishment but instead provide for increased punishment of all individuals who have engaged in certain additional relevant conduct.[1] The relevant conduct provision of the Sentencing Guidelines, permitting a court to consider conduct other than that for which the defendant was convicted, is not an unconstitutional bill of attainder.[2] A drug distribution statute's use of a lower weight threshold for cocaine base offenses than for powder cocaine offenses in triggering a 10-year mandatory minimum sentence does not make the statute an unconstitutional bill of attainder, despite the statute's purportedly disproportionate effect on black defendants.[3] Moreover, the statutory minimum sentence applicable to the defendant's sentencing for manufacturing cocaine base, which does not itself determine the guilt of or inflict punishment upon any identifiable individual, is not a prohibited bill of attainder.[4]

An amendment to the Sentencing Reform Act to delete the clause requiring the Parole Commission to set release dates within the guideline range was not a bill of attainder with respect to federal prisoners who were members of an entire class of persons who could be affected.[5]

Footnotes

1 U.S. v. Dorlouis, 107 F.3d 248 (4th Cir. 1997).
As to sentencing guidelines, generally, see Am. Jur. 2d, Criminal Law §§ 748 to 805.

2 U.S. v. Bennett, 928 F.2d 1548 (11th Cir. 1991).

3 U.S. v. Edwards, 98 F.3d 1364 (D.C. Cir. 1996).

4 U.S. v. Gordon, 403 Fed. Appx. 384 (11th Cir. 2010).
A statute providing a mandatory minimum sentence of 10 years' imprisonment for a heroin conspiracy offense is not an unconstitutional bill of attainder where the statute is a generally applicable rule decreeing that any person who conspires to possess one kilogram or more of heroin will be sentenced to a minimum of 10 years in prison, and does not target any individual or group. U.S. v. Castaing-Sosa, 338 Fed. Appx. 852 (11th Cir. 2009).

5 Bledsoe v. U.S., 384 F.3d 1232 (10th Cir. 2004).
Because a prisoners' offense severity rating of Category 8 put them in a guideline range with no specified upper limit, the Sentencing Reform Act did not narrow the discretion of the Parole Commission in selecting a release date for them, and a later amendment reinstating the Commission's authority to issue release dates outside the guideline range had no effect on them so as to violate the bill of attainder clauses. Von Kahl v. U.S., 321 Fed. Appx. 724 (10th Cir. 2009).

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 724. Environmental protection laws and regulations as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(1)

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and its retroactivity provisions do not violate the bill of attainder provisions of the United States Constitution.[1] An allegedly burdensome and excessive solid waste management ordinance was not an unconstitutional bill of attainder, even though the solid waste collector was the only entity which had operated a landfill in the past and the only entity currently pursuing the project for which a permit was required under the ordinance, since the ordinance did not single out the collector but attached itself to described activities and since the ordinance was not punitive, particularly as it did not prevent the collector from operating a landfill in the county.[2] A statutory provision subjecting a sewer utility to a state public service board's jurisdiction was not an unconstitutional bill of attainder, inasmuch as the legislature did not enact the provision as a form of punishment, the provision furthered nonpunitive legislative purposes by subjecting the company operating the monopoly utility to regulation by the board, and the legislature did not confiscate the utility's property nor bar it from the sewer business.[3] A city council's findings of fact and conclusions of law that septic systems installed by a water quality cooperative were not in compliance with city ordinances did not violate the constitutional prohibition against bills of attainder, given that the city council was acting in a quasi-judicial capacity rather than a legislative capacity, and the cooperative failed to show that it was singled out as to the compliance requirements.[4] A provision of an Oil Pollution Act excluding from the waters of Prince William Sound any vessel which had spilled more than a specified amount of oil into the marine environment after the designated date satisfied the specificity aspect of an unconstitutional bill of attainder, which required that the statute specify affected persons, even though the statute did not name any vessel and, despite its retrospective impact, had the potential to affect a growing number of vessels in time, given that the class of 10 vessels which

the statute would affect retrospectively was easily ascertainable at the time Congress passed the Act, and the statute singled out a particular vessel, which had spilled nearly 11 million gallons of oil into Prince William Sound on the day after the statute's designated date, based on irreversible acts occurring prior to the Act's passage.[5]

An omnibus appropriations act, wherein Congress exempted a bridge through Everglades National Park from compliance with the National Environmental Policy Act and Federal Advisory Committee Act, is not an unlawful bill of attainder against an Indian Tribe where the act does not even apply to tribe and its members, much less punish them, but rather, simply directs the Army Corps of Engineers to initiate construction of the project notwithstanding any other provision of the law.[6]

Footnotes

1 ASARCO LLC v. Goodwin, 756 F.3d 191 (2d Cir. 2014); U.S. v. Rohm and Haas Co., 939 F. Supp. 1142 (D.N.J. 1996).
Comprehensive Environmental Response, Compensation, and Liability Act, generally, see Am. Jur. 2d, Pollution Control §§ 1160 to 1388.

2 WMX Technologies, Inc. v. Gasconade County, Mo., 105 F.3d 1195 (8th Cir. 1997).
Solid waste management, generally, see Am. Jur. 2d, Pollution Control §§ 1036 to 1051.

3 Petition of Quechee Service Co., Inc., 166 Vt. 50, 690 A.2d 354 (1996).
Water pollution, generally, see Am. Jur. 2d, Pollution Control §§ 675 to 1035.

4 Headwaters Rural Utility Ass'n, Inc. v. City of Corcoran City Council, 2006 WL 1751738 (Minn. Ct. App. 2006).

5 SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662 (9th Cir. 2002) (held not a bill of attainder as the statute was not a punishment).

6 Miccosukee Tribe of Indians of Florida v. U.S., 650 F. Supp. 2d 1235 (S.D. Fla. 2009), judgment aff'd, 619 F.3d 1289 (11th Cir. 2010).

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16B Am. Jur. 2d Constitutional Law § 725

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 725. Firearms legislation as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(7)

A state statute barring possession of a firearm by a person convicted of a felony is not punitive, and thus does not constitute a prohibited bill of attainder.[1] More specifically, statutes prohibiting being a felon in possession of a firearm and possessing a firearm by a person convicted of domestic violence are not "bills of attainder"; the statutes do not determine guilt based on prior felony convictions, nor do they remove the protections of a trial.[2]

Footnotes

1 Zivkovic v. State, 150 Idaho 783, 251 P.3d 611 (Ct. App. 2011); State v. Whitaker, 364 N.C. 404, 700 S.E.2d 215, 63 A.L.R.6th 755 (2010).

2 U.S. v. Hemmings, 258 F.3d 587 (7th Cir. 2001).
Possession of a firearm by a felon, generally, see Am. Jur. 2d, Weapons and Firearms §§ 26 to 28.

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16B Am. Jur. 2d Constitutional Law § 726

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 726. Military laws and policies as bills of attainder; veterans' benefits

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(1)

An Air Force policy to the effect that a statement by an officer that he is a homosexual creates a rebuttable presumption that the officer has a propensity to engage in homosexual acts is not a bill of attainder and a military policy pertaining to homosexuality does not fall within the historical meaning of legislative punishment; under the policy homosexuals are not barred from the military simply because they are homosexuals, since the policy leaves open the possibility of qualifying for continued service in the military when the person has declared himself to be a homosexual, but overcomes the presumption that he has a propensity to engage in homosexual acts.[1] An amendment to a regulation of the Puerto Rico Air National Guard which stated that members who tested positive for the human immunodeficiency virus were not entitled to a hearing prior to transfer to the standby reserves and discharge was not an illegal bill of attainder; the amendment was a duly approved, general policy change designed to effect the nonpunitive purpose of eliminating unnecessary, costly procedures.[2]

Assuming that the Military Commissions Act's bar of district court's jurisdiction to hear or consider an alien's damages suit related to detention and conditions of confinement at the Naval Facility at Guantanamo Bay, Cuba, and other U.S. bases[3] meets the specificity requirement for a bill of attainder because it applies only to enemy combatants, where the plaintiff alien advances no argument that the jurisdictional bar is a form of punishment, this precludes a bill of attainder clause challenge to the jurisdictional bar.[4]

A "door-closing" statute forbidding judicial review of individual veterans' benefits decisions does not qualify as a bill of attainder.[5] Also, a statute that bars veterans and their dependents from receiving benefits while veterans or their beneficiaries are fugitive felons is not a bill of attainder.[6] Moreover, a statute and regulation prohibiting the payment of pension benefits to veterans during their incarceration in a correctional facility are not unconstitutional bills of attainder.[7]

Observation:

Since a bill of attainder requires legislative action intended to punish an individual, the placement of a United States citizen, who was leader of terrorist organization and killed overseas in a drone strike, on a military "kill list" is not a bill of attainder, as would violate the Constitution where Congress does not take formal action to authorize the strike on a citizen.[8]

A statute denying federal financial aid to male students who failed to register for the draft was not a "bill of attainder" by singling out nonregistrants and making them ineligible for aid based on their past conduct in failing to register where the statute clearly gave nonregistrants 30 days after receiving notice that they were ineligible for aid to register for the draft and qualify for aid.[9] A similar statute providing that male residents born after December 31, 1959, who do not file a certification of registration with the selective service system, are not eligible for state-subsidized college and university tuition does not impose a penalty without benefit of a criminal proceeding, in violation of a state constitutional provision prohibiting imposition of punishment by the legislature, but rather is the consequence for failure to comply which is limited to the imposition of a tuition rate at the true value of the services rather than the subsidized rate.[10]

Footnotes

1 Richenberg v. Perry, 909 F. Supp. 1303 (D. Neb. 1995), injunction pending appeal denied, 73 F.3d 172 (8th Cir. 1995) and judgment aff'd, 97 F.3d 256 (8th Cir. 1996).
Enlistment and commissioning in military service, generally, see Am. Jur. 2d, Military and Civil Defense §§ 40 to 55.

2 Charles v. Rice, 28 F.3d 1312 (1st Cir. 1994).

3 28 U.S.C.A. § 2241(e)(2).

4 Jawad v. Gates, 832 F.3d 364 (D.C. Cir. 2016).

5 Marozsan v. U.S., 90 F.3d 1284 (7th Cir. 1996).

6 Mountford v. Shinseki, 24 Vet. App. 443 (2011).

7 Latham v. Brown, 4 Vet. App. 265 (1993), decision aff'd, 11 F.3d 1070 (Fed. Cir. 1993).

8 Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014).

9 Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 18 Ed. Law Rep. 115 (1984).

10 Klepper v. Ohio Bd. of Regents, 59 Ohio St. 3d 131, 570 N.E.2d 1124, 67 Ed. Law Rep. 266 (1991).

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16B Am. Jur. 2d Constitutional Law § 727

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 727. Public employment laws and policies as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(6)

Legislation contained in a general appropriation act which had the effect of altering the terms, conditions, and nature of the commission of an administrative justice of the housing court was not violative of the prohibition against bills of attainder contained in a state's declaration of rights, absent evidence, other than statements attributed to individual legislators, to establish the truth of the assertion that the motive and purpose of the legislation was the refusal of the administrative justice to accede to demands of certain legislators with respect to the exercise of the judicial appointment power.[1] Likewise, while workers' compensation hearing referees may have had legitimate expectations of continued employment as hearing referees, statutes eliminating the position of hearing referee and creating a board of magistrates did not deprive the hearing referees of their civil service status and did not punish them; thus, the statutes were not unconstitutional bills of attainder.[2] Similarly, the removal of a town planner by a town meeting, as proposed by the residents of the town who called for a meeting to eliminate the position of the town planner, would not constitute a "bill of attainder" in violation of the United States Constitution, though the town board of selectmen claimed that the true purpose of meeting called by town residents was to fire the incumbent planner rather than eliminate the position of town planner, as the residents did not seek to exclude a particular person or group of persons from the town planner job but were proposing legislation that would exclude everyone from the job by abolishing it, and the piece of legislation was not a bill of attainder by virtue of the fact that it burdened a particular individual more than others even if it was passed with that particular individual in mind.[3] A city's enactment of a budget which reduced the pay and scope of the personnel director's position did not amount to unconstitutional "bill of attainder."[4] A statute providing for forfeiture of a public employee's pension for less than honorable service does not constitute a bill of attainder, since it applied only to proscribed

conduct occurring on or after the effective date of the statute.[5] However, a legislature violated federal and state constitutional prohibitions against bills of attainder by passing a local law the day after a county commissioner was named to the unexpired portion of a deceased commissioner's term, stating that such appointment would be temporary until an election was held.[6] Also, a local law reconstituting a county school board and providing for procedures to select the chairperson of the board is a bill of attainder where the application of the law would cut short the chairperson's four-year term previously established by statute and local board policy and the law was passed almost two years prior to the end of the current chairperson's term.[7]

Where a legislative body is granted the power to discipline its own members, an action taken based on that authorization is legislative in nature, rather than the exercise of a forbidden judicial function, and thus does not qualify as a bill of attainder.[8] Accordingly, where a state constitution confers on the state legislature the power to determine rules of its proceedings and punish its members for disorderly behavior, making the power a legislative power, the state legislature's resolution to expel a legislator from the state house of representatives without judicial trial is not impermissible.[9] The Hawaii Constitution's resign-to-run provision does not constitute an unconstitutional bill of attainder; the burdens to the constitutional rights of a mayor who wished to run for the office of governor without resigning and the voters who wished to vote for him were minimal, and the resign-to-run provision furthered several nonpunitive legislative purposes.[10] A constitutional amendment placing a limit on the number of terms which legislators and other state officials may serve is not an unlawful bill of attainder, even though proponents of the initiative measure had argued that one of the effects of its adoption would be to end the reign of two powerful legislative officers.[11] However, removal of a justice of a state supreme court by majority vote of both houses of the legislature without an opportunity for the justice to be heard violates the prohibition against bills of attainder if the removal could be construed as punishment for past misconduct; however, the justice's impeachment for an official misdemeanor, which gives the justice an opportunity to be heard, does not violate the state constitutional prohibition against bills of attainder.[12]

A police officer's widow's action against a board of trustees of a public employees' pension fund, alleging the board breached a fiduciary duty by reducing her pension benefits by one-third when her son reached age 23, contrary to earlier representations, did not implicate the constitutional prohibition of any bill of attainder; the suit did not challenge the governing statute or bylaws but rather the board's actions under those provisions.[13]

Footnotes

1 Administrative Justice of Housing Court Dept. v. Commissioner of Admin., 391 Mass. 198, 461 N.E.2d 243 (1984).
Compensation of public officers and employees, generally, see Am. Jur. 2d, Public Officers and Employees §§ 258 to 285.

2 Matulewicz v. Governor of Michigan, 174 Mich. App. 295, 435 N.W.2d 785 (1989).

3 Morris v. Congdon, 277 Conn. 565, 893 A.2d 413 (2006).

4 Chernov v. City of Hollywood, 819 F. Supp. 1070 (S.D. Fla. 1993), aff'd, 19 F.3d 1446 (11th Cir. 1994).

5 West Virginia Public Employees Retirement System v. Dodd, 183 W. Va. 544, 396 S.E.2d 725 (1990) (overruled on other grounds by, Booth v. Sims, 193 W. Va. 323, 456 S.E.2d 167 (1995)).

6 Fulton v. Baker, 261 Ga. 710, 410 S.E.2d 735 (1991).

7 Cook v. Smith, 288 Ga. 409, 705 S.E.2d 847, 264 Ed. Law Rep. 897 (2010).

8 Durham v. Martin, 388 F. Supp. 3d 919 (M.D. Tenn. 2019), aff'd, 789 Fed. Appx. 533 (6th Cir. 2020).

9 Durham v. Martin, 388 F. Supp. 3d 919 (M.D. Tenn. 2019), aff'd, 789 Fed. Appx. 533 (6th Cir. 2020).

10 Fasi v. Cayetano, 752 F. Supp. 942 (D. Haw. 1990).

11 Legislature v. Eu, 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991).

12 In re Advisory Opinion (Chief Justice), 507 A.2d 1316 (R.I. 1986).

13 City of El Paso v. Heinrich, 284 S.W.3d 366 (Tex. 2009).

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16B Am. Jur. 2d Constitutional Law § 728

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 728. Tax laws and regulations as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(1)

A.L.R. Library

Validity, construction, and application of provisions for assessment and review of civil penalty against taxpayer who files frivolous income tax return (26 U.S.C.A. secs. 6702-6703), 84 A.L.R. Fed. 433

A bona fide revenue-raising measure is not considered confiscation of property—an historic example of legislative punishment—because imposition of a tax is not considered a taking.[1]

In distinguishing penalties from taxes, the Supreme Court has explained that if the concept of penalty means anything, it means punishment for an unlawful act or omission, and that a shared responsibility payment may for constitutional purposes be considered a tax, not a penalty.[2] Thus, the requirement of the Patient Protection and Affordable Care Act that an individual either purchase qualifying health insurance, obtain an exemption to the penalty, or pay the penalty, is not an unconstitutional bill of attainder where it applies to everyone rather than targeting a specific group, and in any case is not a punishment, but a tax.[3]

The Internal Revenue Code is not a bill of attainder.[4] Neither does the assessment of statutory penalties by the Internal Revenue Service constitute a bill of attainder, as the Internal Revenue Code does not determine guilt, the tax laws do not punish, and there is no selection of any specific individual or group of individuals, as the tax laws apply to all income earners.[5] The statute governing the penalty for filing a frivolous tax return proscribes conduct only and does not inflict punishment on a specific group and therefore is not a bill of attainder.[6]

A statutory scheme establishing a public list of the top 500 delinquent state taxpayers who owed in excess of $100,000, and providing for suspension of driver's license of a taxpayer on the list until full payment of the tax obligation is arranged, does not constitute an unconstitutional bill of attainder, with respect to a taxpayer whose driver's license is suspended.[7]

A territory's corporate alternative minimum tax statute, representing a 325% increase for certain cross-border sales or transfers does not violate the bill of attainder clause where it does not punish multistate corporations for any past or future misdeeds, but rather reasonably furthers nonpunitive goals of yielding revenue for the insolvent government of Puerto Rico.[8]

An additional tax imposed on the plaintiff by a statutory amendment is not within the historic meaning of legislative punishment.[9]

Footnotes

1 Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 39 A.3d 228 (App. Div. 2012), also published at, 26 N.J. Tax 575, 2012 WL 3711188 (Super. Ct. App. Div. 2012).

2 National Federation of Independent Business v. Sebelius, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012); Olson v. Social Security Administration, 243 F. Supp. 3d 1037 (D.N.D. 2017), aff'd, 709 Fed. Appx. 398 (8th Cir. 2017).

3 Olson v. Social Security Administration, 243 F. Supp. 3d 1037 (D.N.D. 2017), aff'd, 709 Fed. Appx. 398 (8th Cir. 2017).

4 Beerbower v. U.S., 592 F. Supp. 67 (E.D. Mich. 1984), judgment aff'd, 787 F.2d 588 (6th Cir. 1986).

5 Cameron v. I.R.S., 593 F. Supp. 1540 (N.D. Ind. 1984), judgment aff'd, 773 F.2d 126 (7th Cir. 1985).

6 Ueckert v. U.S., 581 F. Supp. 1262 (D.N.D. 1984); Bearden v. C.I.R., 575 F. Supp. 1459 (D. Utah 1983).

7 Franceschi v. Yee, 887 F.3d 927 (9th Cir. 2018), cert. denied, 139 S. Ct. 648, 202 L. Ed. 2d 493 (2018).

8 Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez, 174 F. Supp. 3d 585 (D.P.R. 2016), aff'd, 834 F.3d 110 (1st Cir. 2016).

9 Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 39 A.3d 228 (App. Div. 2012), also published at, 26 N.J. Tax 575, 2012 WL 3711188 (Super. Ct. App. Div. 2012) (amendment eliminated the tax cap on premiums received by health service corporations).

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16B Am. Jur. 2d Constitutional Law § 729

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 729. Zoning laws and regulations as bills of attainder

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(8)

Trial Strategy

Zoning—Circumstances Warranting Relief From Zoning Ordinance, 25 Am. Jur. Proof of Facts 3d 541
Relief from Zoning Ordinance, 16 Am. Jur. Trials 99

In order for a zoning ordinance to constitute a "bill of attainder," it must apply only to an individual or identifiable group, and the purpose behind the ordinance must be to punish without the benefit of a judicial trial; whether the purpose of the ordinance is to punish can be measured by an historical test, a motivational test, and a functional test.[1] A zoning ordinance restricting acquisition of a permit for renovation of apartment buildings in certain neighborhoods is not an unconstitutional bill of attainder where the ordinance does not absolutely deny owners the right to renovate the property and where there was evidence that the ordinance's intent is to prevent displacement of low income tenants rather than simply to punish the landlords affected.[2] Legislative authorization to remove litter or any other public nuisance furthers a legitimate public purpose and is fundamentally different from the punitive confiscation of property that historically marked a bill of pains and penalties. Importantly, the confiscation of property is not necessarily the punitive confiscation of property.[3] An amended zoning ordinance

changing lot size requirements for dwellings from one to two acres is not a bill of attainder where the amendment does not single out any landowner or refer to any properties in terms of the identity of the owner.[4] Also, a city ordinance restricting the storage and parking of recreational vehicles in residential yards and driveways is not a bill of attainder, where the ordinance applies to an entire class of property owners citywide.[5] An amendment to a city zoning ordinance, which previously classified religious organizations as conditional uses in a residential zoning district, but classified public and private parks, playgrounds, and recreational facilities as permitted uses, to reclassify parks, playgrounds and recreational facilities as conditional uses in a residential zoning district, is not a bill of attainder where the amendment does not determine that the church is guilty of anything or impose any type of legislative punishment.[6] A city's general plan amendment changing a property's land use designation is not an unconstitutional bill of attainder where there is no showing of any intent to punish the property owner.[7] Even where the property and owner are identified in a voter-approved amendment to a city charter, which prevents the property owner from developing its land in the manner previously approved by city ordinance, the punitive purpose fails where the owner does not allege that the property was seized without compensation, and also where eliminating the owner's ability to build high-density housing on its land furthered a legitimate nonpunitive interests in public safety and reducing traffic congestion, in light of the fact that there was no information as to the voters' motives in approving amendment.[8] However, rescinding a building permit may, under certain circumstances, constitute a "bill of attainder."[9]

A town's portable sign ordinance does not violate the constitutional prohibition against bills of attainder.[10]

City ordinances regulating the location of adult stores and allowing a grace period for the necessary relocations or terminations were not bills of attainder; although the ordinances applied to an easily ascertained group, the city had the authority to require the termination of nonconforming uses within a reasonable period of time, adult stores had historically been subject to restrictions and regulations, and ordinances provided a hearing to extend the grace period.[11] Additionally, zoning ordinances restricting the location of so-called "adult businesses" within a city, by precluding any such business from operating within 500 feet of a residential or office district, do not amount to unlawful bills of attainder where their purpose is not to inflict punishment but to regulate the use of land and where they apply across the board to all similarly situated property owners.[12]

A local act deannexing a portion of a city in which the mayor resided, thus rendering the mayor disqualified from office, was not unconstitutional "bill of attainder" under the State or Federal Constitution; the act neither singled out the mayor nor punished him as an officeholder as many city residents were affected by the deannexation, nothing on the face of the act suggested a punitive intent on the part of the legislature, and the mayor did not establish that the legislation was not a legitimate regulation of conduct.[13]

Footnotes

1 Achtien v. City of Deadwood, 814 F. Supp. 808 (D.S.D. 1993).

2 ABN 51st Street Partners v. City of New York, 724 F. Supp. 1142 (S.D. N.Y. 1989).

3 Ferreira v. Town of East Hampton, 56 F. Supp. 3d 211 (E.D. N.Y. 2014) (town resolution finding property owner violated code by storing vehicles on property and authorizing entry onto property to remove items).

4 Rivervale Realty Co., Inc. v. Town of Orangetown, N.Y., 816 F. Supp. 937 (S.D. N.Y. 1993).

5 Disney v. City of Concord, 194 Cal. App. 4th 1410, 124 Cal. Rptr. 3d 58 (1st Dist. 2011), as modified, (May 2, 2011).

6 Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299 (M.D. Fla. 2014).

7 Litton Intern. Development Corp. v. City of Simi Valley, 616 F. Supp. 275 (C.D. Cal. 1985).

8 Center for Powell Crossing, LLC v. City of Powell, Ohio, 173 F. Supp. 3d 639 (S.D. Ohio 2016).

9 Achtien v. City of Deadwood, 814 F. Supp. 808 (D.S.D. 1993).

10 Falls v. Town of Dyer, Ind., 756 F. Supp. 384 (N.D. Ind. 1990).

11 World Wide Video of Washington, Inc. v. City of Spokane, 125 Wash. App. 289, 103 P.3d 1265 (Div. 3 2005).

12 Specialty Malls of Tampa v. City of Tampa, Fla., 916 F. Supp. 1222 (M.D. Fla. 1996), aff'd, 109 F.3d 770 (11th Cir. 1997).

13 Lee v. City of Villa Rica, 264 Ga. 606, 449 S.E.2d 295 (1994).

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16B Am. Jur. 2d Constitutional Law § 730

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X. Retrospective Legislation

A. Ex Post Facto Laws and Bills of Attainder

2. Bills of Attainder

b. Particular Legislation as Within Prohibition

§ 730. Application of bill of attainder provision to miscellaneous laws

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1100(1), 1100(9)

Numerous courts, in considering a variety of laws, have concluded that such laws were not bills of attainders, including laws—

— requiring that a reduced temporary rate be set for a specific utility, and the final revised rate be determined, after the utility abandoned construction on nuclear reactors.[1]

— stripping courts of jurisdiction over any nonhabeas action brought by an alien enemy combatant relating to detention, treatment, trial, or conditions of confinement.[2]

— allowing commercial airline pilots, who had already turned 60 before the statute raised the mandatory retirement age for pilots from 60 to 65, to fly again, but without any of the seniority or benefits to which their prior service would otherwise have entitled them.[3]

— forbidding the issuance of a mortgage loan originator license to an applicant who had been convicted of or pleaded guilty to a felony within seven years prior to the application.[4]

— prohibiting the law school standardized test sponsor from "flagging" test scores reported to law schools as having been achieved with extra testing time as an accommodation under the Americans with Disabilities Act.[5]

— imposing a fee on landlords to reinspect rental property where the city code applies to property owners as a whole and exists for the nonpunitive purpose of reimbursing the city for expenses associated with reinspections.[6]

— punishing a defendant convicted of operating a motor vehicle while his or her operator's license is under suspension[7] and extending the period of a driver's license revocation.[8]

— suspending a license for failure to pay child support.[9]

Various courts have also found no bills of attainder in miscellaneous liquor laws,[10] insurance laws,[11] lemon laws,[12] state attorney disciplinary rules,[13] conflict-of-interest laws,[14] and civil rights laws.[15]

However, the proscription against bills of attainder prohibits such sanctions as legislation barring individuals or groups from participation in specific types of employment or vocation.[16] Also, state legislation that categorically prohibited the State Department of Health and Human Service from providing state or federal funds to a family planning organization and its affiliates is punitive in nature, and thus constitutes an unconstitutional bill of attainder, where the legislation was specifically intended to single out and punish organization and its affiliates for its separate abortion-related activities.[17]

Footnotes

1 South Carolina Electric & Gas Company v. Randall, 333 F. Supp. 3d 552 (D.S.C. 2018), appeal dismissed, 2018 WL 7203223 (4th Cir. 2018).

2 Ameur v. Gates, 759 F.3d 317 (4th Cir. 2014).

3 Adams v. U.S., 796 F. Supp. 2d 67 (D.D.C. 2011), aff'd, 720 F.3d 915 (D.C. Cir. 2013).

4 Garozzo v. Missouri Dept. of Ins., Financial Institutions & Professional Registration, Div. of Finance, 389 S.W.3d 660 (Mo. 2013).

5 Law School Admission Council, Inc. v. State of California, 222 Cal. App. 4th 1265, 166 Cal. Rptr. 3d 647, 300 Ed. Law Rep. 997 (3d Dist. 2014), as modified, (Feb. 11, 2014).

6 City of Fargo v. Rakowski, 2016 ND 79, 877 N.W.2d 814 (N.D. 2016).

7 State v. Washburn, 34 Conn. App. 557, 642 A.2d 70 (1994).

8 Mannelin v. Driver and Motor Vehicle Services Branch, 176 Or. App. 9, 31 P.3d 438 (2001), aff'd, 336 Or. 147, 82 P.3d 162 (2003).

9 Knight v. City of Mercer Island, 70 Fed. Appx. 413 (9th Cir. 2003).

10 Harrington v. Strong, 363 F. Supp. 3d 984 (D. Neb. 2019); G & G Fremont, LLC v. City of Las Vegas, 202 F. Supp. 3d 1175 (D. Nev. 2016).

11 Osuna v. Government Employees Ins. Co., 623 Fed. Appx. 3 (2d Cir. 2015).

12 DaimlerChrysler Corp. v. Executive Director, Maine Revenue Services, 2007 ME 62, 922 A.2d 465 (Me. 2007).

13 Gilchrist v. Arizona Supreme Court, 10 Fed. Appx. 468 (9th Cir. 2001).

14 Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

15 Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C., 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986).

16 In re McEvoy, 267 Mich. App. 55, 704 N.W.2d 78, 202 Ed. Law Rep. 778 (2005); Yocum v. Greenbriar Nursing Home, 2005 OK 27, 130 P.3d 213 (Okla. 2005).

17 Planned Parenthood of Cent. North Carolina v. Cansler, 877 F. Supp. 2d 310 (M.D. N.C. 2012).

16B Am. Jur. 2d Constitutional Law § 731

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Constitutional Law
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

X. Retrospective Legislation

B. Other Retrospective Laws

1. General Constitutional Principles

a. In General

§ 731. Definition of "retrospective" or "retroactive" laws

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2785

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Retroactive Application of State Statutes Concerning Asbestos Liability, 41 A.L.R.6th 445

One modern definition of a "retrospective law" is that every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already passed is a retrospective statute.[1] Legislation is considered retroactive if its application determines the legal significance of acts or events that occurred prior to the statute's effective date.[2] A statute does not operate retroactively or retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law; instead, a court must ask whether the new provision attaches new legal consequences to events completed before its enactment.[3]

The mere fact that a statute has a retrospective application does not necessarily render it unconstitutional.[4] For instance, a statute that merely clarifies rather than changes existing law does not operate retrospectively even if it is applied to transactions

predating its enactment.[5] The retroactive nature of clarifying legislation has limits and must not operate in a manner that would unjustly abrogate "vested rights."[6] However, retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions.[7]

With respect to determining the retroactivity of legislation, elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.[8] However, legislation readjusting rights and burdens is not unlawful solely because it upsets settled expectations, even if it imposes a new duty or liability based on past acts.[9] In determining whether a retroactive application of legislation will result in manifest injustice such that it should not be so applied, the inquiry should center upon the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in the law upon those rights; Congress has wide latitude in making civil statutes retroactive.[10]

Practice Tip:

One can overcome the presumption that newly enacted laws operate prospectively by demonstrating the legislature intended retroactive application, and the question then becomes whether enforcement of a retroactive law will unconstitutionally interfere with vested rights or will result in a manifest injustice.[11] Specifically, inquiry into whether a statute operates retroactively demands common sense, a functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment;[12] this judgment should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.[13] Thus, only those retroactive statutes which, on a balancing of opposing considerations, are deemed to be unreasonable are held to be unconstitutional.[14]

"Retrospective" has a meaning analogous to "ex post facto" as applied to criminal and penal statutes.[15]

The terms "retrospective" and "retroactive" are frequently used interchangeably, even though, in fact, they have different meanings; for purposes of the rule that courts should not apply "retroactive" statutes "retrospectively" absent a clear congressional intent, "retrospective" describes the application of a new statute to events that occurred before its enactment, and "retroactive" describes a statute that if applied would attach new legal consequences to conduct or transactions already completed.[16] If the retroactive application of the legislation violates the constitutional prohibition on ex post facto laws, it is deemed retrospective and, as such, is invalid.[17]

A retrospective statute is considered "interpretive," for purposes of determining whether it may be retroactively applied, when it does not create new rules but merely establishes a meaning that the interpretive statute had from the time of its enactment; it is the original statute, not the interpretive one, that establishes rights and duties.[18] A "substantive law," which ordinarily can be applied prospectively only, is one that creates an obligation such that it creates, confers, defines, or destroys rights, liabilities, causes of action, or legal duties.[19] If new legislation or an amendment is procedural, it may be applied retrospectively, but if it is substantive, it may not be so applied.[20] However, when determining whether a new statute operates retroactively, it is not enough to attach a label such as "procedural" to a statute; a court must ask whether the statute operates retroactively.[21] Even

if a statute is prospective in its operation, it may nonetheless implicate a state's constitutional retroactivity clause if it divests a party of substantive rights, particularly property rights, which vested prior to the enactment of the statute.[22]

Observation:

The right to a jury trial, where it exists, is a substantive right, not a procedural one, for purposes of determining whether a law affecting that right is subject to a constitutional prohibition on retroactivity.[23]

Footnotes

1 Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996); Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs, 948 P.2d 1002 (Colo. 1997), as modified on denial of reh'g, (Dec. 15, 1997); State v. Young, 362 S.W.3d 386 (Mo. 2012).
Impairment of vested rights, specifically, see §§ 741 to 746.

2 Liberty Mut. Ins. Co. v. Superintendent of Ins., 1997 ME 22, 689 A.2d 600 (Me. 1997).

3 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); Western Security Bank v. Superior Court, 15 Cal. 4th 232, 62 Cal. Rptr. 2d 243, 933 P.2d 507, 32 U.C.C. Rep. Serv. 2d 534 (1997).
Laws that are made to apply to future transactions are not retroactive, for purposes of the Ex Post Facto Clause, merely because such transactions are founded upon antecedent events. Acevedo v. New York State Dept. of Motor Vehicles, 29 N.Y.3d 202, 54 N.Y.S.3d 614, 77 N.E.3d 331 (2017).

4 Liberty Mut. Ins. Co. v. Whitehouse, 868 F. Supp. 425 (D.R.I. 1994); Sanelli v. Glenview State Bank, 108 Ill. 2d 1, 90 Ill. Dec. 908, 483 N.E.2d 226 (1985).
Constitutional limitations, generally, see § 732.

5 Western Security Bank v. Superior Court, 15 Cal. 4th 232, 62 Cal. Rptr. 2d 243, 933 P.2d 507, 32 U.C.C. Rep. Serv. 2d 534 (1997).

6 State v. State Employees' Review Board, 239 Conn. 638, 687 A.2d 134 (1997).

7 Downriver Plaza Group v. City of Southgate, 444 Mich. 656, 513 N.W.2d 807 (1994).
Retroactive legislation is generally unfair and raises numerous constitutional questions. O'Brien v. J.I. Kislak Mortg. Corp., 934 F. Supp. 1348 (S.D. Fla. 1996).

8 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

9 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976); DIRECTV, Inc. v. F.C.C., 110 F.3d 816 (D.C. Cir. 1997); In re Lancy, 208 B.R. 481 (Bankr. D. Ariz. 1997); State v. L.V.I. Group, 1997 ME 25, 690 A.2d 960 (Me. 1997).
A statute does not operate retrospectively just because it upsets expectations based on prior law; but it has retroactive effect if it takes away or impairs a party's vested rights acquired under existing laws; or if the statute's application increases liability for past conduct or imposes new duties or disabilities with respect to completed transactions. In re Flint, 174 Wash. 2d 539, 277 P.3d 657 (2012).

10 County of Oakland by Kuhn v. City of Detroit, 784 F. Supp. 1275 (E.D. Mich. 1992).

11 R.L.U. v. J.P., 457 N.J. Super. 129, 198 A.3d 304 (App. Div. 2018).

12 Martin v. Hadix, 527 U.S. 343, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999).

13 Martin v. Hadix, 527 U.S. 343, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999); Santiago-Lebron v. Florida Parole Com'm, 767 F. Supp. 2d 1340 (S.D. Fla. 2011).

14 Ruotolo v. State, 187 A.D.2d 160, 593 N.Y.S.2d 198 (1st Dep't 1993), order aff'd, 83 N.Y.2d 248, 609 N.Y.S.2d 148, 631 N.E.2d 90 (1994).

15 People v. D.K.B., 843 P.2d 1326 (Colo. 1993).

Ex post facto laws, generally, see §§ 685 to 711.

16 Mannatt v. U.S., 951 F. Supp. 172 (E.D. Cal. 1996), aff'd, 185 F.3d 868 (9th Cir. 1999).

17 Mesa County Land Conservancy, Inc. v. Allen, 2012 COA 95, 318 P.3d 46, 77 U.C.C. Rep. Serv. 2d 738 (Colo. App. 2012).

18 Prejean v. Dixie Lloyds Ins. Co., 655 So. 2d 303 (La. 1995), opinion modified on reh'g on other grounds, 660 So. 2d 836 (La. 1995).

19 Appalachee Enterprises, Inc. v. Walker, 266 Ga. 35, 463 S.E.2d 896 (1995); National Equity Life Ins. Co. v. Eicher, 633 So. 2d 1351 (La. Ct. App. 1st Cir. 1994).

Substantive law, a change to which does not apply to pending criminal cases, creates, defines, and regulates rights. State v. Cota, 234 Ariz. 180, 319 P.3d 242 (Ct. App. Div. 2 2014).

20 Alwan v. Kickapoo-Edwards Land Trust, 2018 IL App (3d) 170165, 419 Ill. Dec. 600, 93 N.E.3d 719 (App. Ct. 3d Dist. 2018).

21 Martin v. Hadix, 527 U.S. 343, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999).

22 In re Davis, 539 B.R. 334 (Bankr. S.D. Ohio 2015) (applying Ohio law).

23 Kneisley v. Lattimer-Stevens Co., 40 Ohio St. 3d 354, 533 N.E.2d 743 (1988).

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X. Retrospective Legislation

B. Other Retrospective Laws

1. General Constitutional Principles

a. In General

§ 732. Constitutional limitations on retrospective laws; legislative intent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2785

The restrictions that the United States Constitution places on retroactive legislation are of limited scope.[1] In the absence of an express constitutional inhibition, retrospective laws are not prohibited as such.[2] Such laws cannot be held invalid unless they violate another constitutional provision such as the provisions relating to due process,[3] equal protection of the laws,[4] impairment of contractual obligations,[5] or ex post facto laws.[6]

Generally, newly enacted laws are applied prospectively, but one can overcome that presumption by demonstrating the legislature intended retroactive application,[7] and the question then becomes whether enforcement of a retroactive law will unconstitutionally interfere with vested rights or will result in a manifest injustice.[8] As a general rule of statutory construction, no provision of a statute will be construed so as to give it a retroactive effect unless such intent clearly appears from the act itself.[9] A legislative intent of retroactivity can be shown (1) when the legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative;[10] or (3) when the expectations of the parties so warrant.[11] However, legislative intent alone is not sufficient to require the retroactive application of a statute, since the retroactive application must also pass constitutional muster.[12] Accordingly, a statute will be given retroactive effect if that is the legislative intent unless to do so would impair vested rights, deny due process, or violate the prohibition against ex post facto laws.[13]

While constitutional impediments to retroactive civil legislation are modest, prospectivity remains the appropriate default rule; the presumption against retroactivity will generally coincide with legislative and public expectations, as it accords with widely held intuitions about how statutes ordinarily operate.[14] The mere fact that retroactive application of a new statute would vindicate its purpose more fully is not sufficient to rebut the presumption against retroactivity.[15]

Footnotes

1 Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

2 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); Salt Lake City v. Tax Com'n of State of Utah ex rel. Mountain States Tel. & Tel. Corp., 813 P.2d 1174 (Utah 1991).

3 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976); Doe v. California Dept. of Justice, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (4th Dist. 2009); Hale v. Wellpinit School Dist. No. 49, 165 Wash. 2d 494, 198 P.3d 1021 (2009).
Due process, generally, see §§ 933 to 1017.

4 Fern v. U.S., 15 Cl. Ct. 580, 1988 WL 102564 (1988), judgment aff'd, 908 F.2d 955 (Fed. Cir. 1990).
Equal protection, generally, see §§ 817 to 932.

5 Doe v. California Dept. of Justice, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (4th Dist. 2009); Gatewood v. South Carolina Dept. of Corrections, 416 S.C. 304, 785 S.E.2d 600 (Ct. App. 2016), cert. denied and cert. denied; In re Estate of Stewart, 545 S.W.3d 458 (Tenn. Ct. App. 2017), appeal denied, (Feb. 14, 2018); Hale v. Wellpinit School Dist. No. 49, 165 Wash. 2d 494, 198 P.3d 1021 (2009); Lands' End, Inc. v. City of Dodgeville, 2016 WI 64, 370 Wis. 2d 500, 881 N.W.2d 702 (2016).
Impairment of contractual obligations, generally, see §§ 769 to 776.
The question then becomes whether enforcement of a retroactive law will unconstitutionally interfere with vested rights or will result in a manifest injustice. R.L.U. v. J.P., 457 N.J. Super. 129, 198 A.3d 304 (App. Div. 2018).

6 As to the prohibition against ex post facto laws, generally, see §§ 685 to 711.

7 Johnson v. Mayor and City Council of Baltimore, 203 Md. App. 673, 40 A.3d 475 (2012), judgment aff'd, 430 Md. 368, 61 A.3d 33 (2013); R.L.U. v. J.P., 457 N.J. Super. 129, 198 A.3d 304 (App. Div. 2018).

8 R.L.U. v. J.P., 457 N.J. Super. 129, 198 A.3d 304 (App. Div. 2018).

9 Evans v. U.S. Parole Com'n, 78 F.3d 262 (7th Cir. 1996) (changes in the law are retroactive only if Congress makes them so expressly).
Statutory amendments are not deemed to be retroactive unless there is an express legislative statement to the contrary. State v. Tollman, 162 Idaho 798, 405 P.3d 583 (2017).

10 As to curative statutes as impairing a vested right, see § 746.

11 R.L.U. v. J.P., 457 N.J. Super. 129, 198 A.3d 304 (App. Div. 2018) (at least one source of intent must be shown before a statute can be given retroactive effect).
Express retroactivity language is unnecessary to determine if the legislature wishes for a statute to apply retroactively; rather, an intent that a statute operate retroactively may be implied. In re Marriage of Weekes, 2020 COA 16, 2020 WL 479054 (Colo. App. 2020).

12 In re Marriage of Buol, 39 Cal. 3d 751, 218 Cal. Rptr. 31, 705 P.2d 354 (1985).

13 Johnson v. Mayor and City Council of Baltimore, 203 Md. App. 673, 40 A.3d 475 (2012), judgment aff'd, 430 Md. 368, 61 A.3d 33 (2013).
As to the constitutional prohibition on ex post facto laws, see §§ 685 to 711.
As to due process as applicable to retrospective laws, see § 735.

14 Martin v. Hadix, 527 U.S. 343, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999) ("traditional presumption" against retroactivity); Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

15 Metropolitan Dade County v. Chase Federal Housing Corp., 737 So. 2d 494 (Fla. 1999).

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X. Retrospective Legislation

B. Other Retrospective Laws

1. General Constitutional Principles

a. In General

§ 733. Policy factors used to determine validity of retroactive legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2785

Three factors assist in determining if a right is vested: (1) the nature of the rights at stake, meaning whether it is procedural, substantive, or remedial; (2) how the rights were affected, meaning whether the rights were partially or completely abolished by the legislation and whether any substitute remedy was provided; and (3) the nature and strength of the public interest furthered by the legislation.[1]

Observation:

In the absence of legislative intent, courts should examine whether the parties expected the law to apply retroactively.[2]

For purposes of analyzing the constitutionality of retroactive legislation, the relevant inquiry is whether the legislation serves a legitimate legislative purpose that is furthered by rational means.[3] A court must exercise special care when assessing retroactive legislation to determine whether its retroactivity is rationally and nonarbitrarily related to legislative goals.[4] Retroactive legislation is constitutional so long as it effects a legitimate legislative purpose furthered by rational means; thus, while the retroactive aspects of legislation, as well as its prospective aspects, must meet the test of due process, that burden is met simply by showing that a retroactive application of the legislation is itself justified by a rational legislative purpose.[5] Where a law has a retroactive effect, courts will also scrutinize the legislation more closely to examine whether the law is reasonably calculated to serve a compelling public interest and the extent to which retrospective application of it creates unfairness.[6] Judicial review of retrospective legislation does not end with the inquiry generally applicable to economic regulation, i.e., whether legislation has a rational basis; instead, courts must balance a number of factors, including fairness to the parties, reliance on preexisting law,[7] the extent of retroactivity, and the nature of the public interest to be served by the law to determine whether the rights affected are subject to alteration by the legislature.[8]

CUMULATIVE SUPPLEMENT

Cases:

In determining whether a retroactive law impermissibly interferes with a vested right in violation of due process, a court should consider the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions. U.S. Const. Amend. 14. Calleros v. Rural Metro of San Diego, Inc., 58 Cal. App. 5th 660, 272 Cal. Rptr. 3d 767 (4th Dist. 2020).

The three-part test to determine whether a retroactive law is unconstitutional, which requires examination of the public interest, the prior right impaired by law, and extent of the impairment, acknowledges the heavy presumption against retroactive laws by requiring a compelling public interest to overcome the presumption, but it also appropriately encompasses the notion that statutes are not to be set aside lightly. Tex. Const. art. 1, § 16. Zaatari v. City of Austin, 615 S.W.3d 172 (Tex. App. Austin 2019), petition for review filed, (Sept. 14, 2020).

[END OF SUPPLEMENT]

Footnotes

1 State v. Dupree, 304 Kan. 43, 371 P.3d 862 (2016).
The reasonableness of a retroactive statute is examined from three principal viewpoints: the nature of the public interest which motivated the legislature to enact the statute; the nature of the rights affected retroactively; and the extent or scope of the statutory impact. Nationwide Mut. Ins. Co. v. Commissioner of Ins., 397 Mass. 416, 491 N.E.2d 1061 (1986).

2 R.L.U. v. J.P., 457 N.J. Super. 129, 198 A.3d 304 (App. Div. 2018).

3 Shadburne-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071 (4th Cir. 1995); Norfolk Energy, Inc. v. Hodel, 898 F.2d 1435 (9th Cir. 1990); In re Chateaugay Corp., 163 B.R. 955 (S.D. N.Y. 1993), aff'd, 53 F.3d 478 (2d Cir. 1995).

4 Central States, Southeast and Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc., 766 F. Supp. 650 (N.D. Ill. 1991), judgment aff'd in part, rev'd in part on other grounds, 960 F.2d 1339 (7th Cir. 1992).

5 National Educ. Association-Rhode Island by Scigulinsky v. Retirement Bd. of Rhode Island Employees' Retirement System, 890 F. Supp. 1143, 102 Ed. Law Rep. 96 (D.R.I. 1995).

The party challenging a retroactive statute bears the burden to prove that the statute is irrational in its application (Deutsche Bank Nat. Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 28 N.E.3d 416 (2015)), but need not show reliance on prior law in structuring his or her conduct. Vartelas v. Holder, 566 U.S. 257, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012).

6 Village of Hempstead v. SRA Realty Corp., 208 A.D.2d 713, 617 N.Y.S.2d 794 (2d Dep't 1994).

7 Romein v. General Motors Corp., 436 Mich. 515, 462 N.W.2d 555 (1990), aff'd, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).

8 Alliance of American Insurers v. Chu, 77 N.Y.2d 573, 569 N.Y.S.2d 364, 571 N.E.2d 672 (1991).

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16B Am. Jur. 2d Constitutional Law § 734

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X. Retrospective Legislation

B. Other Retrospective Laws

1. General Constitutional Principles

b. Validity Under Federal Constitution

§ 734. Validity of retrospective legislation under Federal Constitution, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2785

The United States Constitution contains no express prohibition of retrospective or retroactive legislation,[1] and Congress has the power to enact laws with retrospective effect.[2] However, a presumption against retroactive legislation embodies a legal doctrine centuries older than our Republic, embraced by the constitutional provisions sets forth in the Ex Post Facto Clause,[3] the Contract Clause, and the Fifth Amendment's Due Process Clause.[4] It was after passage of the 14th Amendment, that the protection afforded by the Due Process Clause was extended so as to prevent retrospective laws from divesting rights of property and vested rights.[5]

Retrospective application of the law will collide with the presumption against retroactivity, where such application will take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past.[6] As also stated there are three ways in which a statute or rule can be impermissible as primarily retroactive—if it impairs rights a party possessed when he or she acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed.[7] However, federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Federal Constitution; so long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.[8] Thus, even if a statute would attach new legal consequences to events completed before

its effective date in the presence of one of these three factors, the statute may still apply retroactively where a clear legislative showing favors such a result.[9]

CUMULATIVE SUPPLEMENT

Cases:

Statute has retroactive effect if it would impair rights that party possessed when he acted, increase party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting substantive rights. Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal, 35 N.Y.3d 332, 130 N.Y.S.3d 759, 154 N.E.3d 972 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Fleming v. Rhodes, 331 U.S. 100, 67 S. Ct. 1140, 91 L. Ed. 1368 (1947); In re Chateaugay Corp., 163 B.R. 955 (S.D. N.Y. 1993), aff'd, 53 F.3d 478 (2d Cir. 1995); Ruotolo v. State, 187 A.D.2d 160, 593 N.Y.S.2d 198 (1st Dep't 1993), order aff'd, 83 N.Y.2d 248, 609 N.Y.S.2d 148, 631 N.E.2d 90 (1994); Robinson v. Crown Cork & Seal Co., Inc., 335 S.W.3d 126 (Tex. 2010).

2 I.N.S. v. St. Cyr, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001).

3 The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).
As to the Ex Post Facto Clause, see §§ 685 to 711.

4 Vartelas v. Holder, 566 U.S. 257, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012).

5 Jefferson Disposal Co., Inc. v. Jefferson Parish, La., 603 F. Supp. 1125 (E.D. La. 1985).
Due process, generally, see §§ 933 to 1017.
Impairment of vested rights, specifically, see §§ 741 to 746.
Although legislative bodies may enact retroactive legislation in limited circumstances, such retroactive legislation may not affect vested rights. King County v. Taxpayers of King County, 132 Wash. 2d 360, 938 P.2d 309 (1997).

6 Vartelas v. Holder, 566 U.S. 257, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012).

7 Ward v. Dixie Nat. Life Ins. Co., 595 F.3d 164, 68 A.L.R.6th 709 (4th Cir. 2010); Wright v. Morris, 111 F.3d 414, 1997 FED App. 0122P (6th Cir. 1997); GreenPoint Mortg. Funding, Inc. v. Poniewozik, 2014 IL App (1st) 132864, 387 Ill. Dec. 833, 23 N.E.3d 525 (App. Ct. 1st Dist. 2014); In re Flint, 174 Wash. 2d 539, 277 P.3d 657 (2012).
A statute or regulation is considered "retroactive" if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. State v. Morales, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24 (2010).

8 Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958).

9 Metroil, Inc. v. ExxonMobil Oil Corp., 672 F.3d 1108 (D.C. Cir. 2012).

16B Am. Jur. 2d Constitutional Law § 735

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Constitutional Law

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X. Retrospective Legislation

B. Other Retrospective Laws

1. General Constitutional Principles

b. Validity Under Federal Constitution

§ 735. Application of due process principles to retrospective laws

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2785

If a retrospective act which is neither an ex post facto law nor one impairing the obligation of a contract should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, but by reason of its repugnancy to the 14th Amendment of the Federal Constitution guaranteeing due process of law.[1] The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.[2] Obviously, no statute may be given an unconstitutional retroactive effect.[3] Retrospective legislation that impairs the judicial rights of the litigant is prohibited under the Due Process Clause of the 14th Amendment when it divests any private vested right or interest.[4] However, the Due Process Clause of the 14th Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly harsh and oppressive.[5] The 14th Amendment does not forbid the creation of new rights, or the abolition of rights recognized by the common law, but the legislature must provide an adequate substitute remedy for the right infringed or abolished.[6]

Footnotes

1 Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945); City of Sanford v. McClelland, 121 Fla. 253, 163 So. 513 (1935).

Due process, generally, see §§ 933 to 1017.

2 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976).

3 Arledge v. Holnam, Inc., 957 F. Supp. 822 (M.D. La. 1996).

4 Jarvis v. National City, 410 S.W.3d 148 (Ky. 2013); Ebinger v. Venus Const. Corp., 65 So. 3d 1279 (La. 2011).

As to the impairment of vested rights, specifically, see §§ 741 to 746.

5 U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); Kilpatrick v. Snow Mountain Pine Co., 105 Or. App. 240, 805 P.2d 137 (1991).

Retroactive legislation is constitutional unless its application is so harsh and oppressive as to transgress the constitutional limitation. Licari v. C.I.R., 946 F.2d 690 (9th Cir. 1991).

6 Pardo v. United Parcel Service, 56 Kan. App. 2d 1, 422 P.3d 1185 (2018).

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X. Retrospective Legislation

B. Other Retrospective Laws

1. General Constitutional Principles

c. Validity Under State Constitutions

§ 736. Validity of retrospective laws under state constitutions, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2785

Although in the constitutions of a large majority of the states there are no constitutional provisions directly forbidding the enactment of retrospective laws,[1] some state constitutions expressly prohibit retrospective laws,[2] as well as the passage of any ex post facto law or law impairing the obligation of contracts.[3]

Footnotes

1 Porter v. Galarneau, 275 Mont. 174, 911 P.2d 1143 (1996); Ruotolo v. State, 187 A.D.2d 160, 593 N.Y.S.2d 198 (1st Dep't 1993), order aff'd, 83 N.Y.2d 248, 609 N.Y.S.2d 148, 631 N.E.2d 90 (1994).
The Pennsylvania Constitution does not invalidate a nonpenal statute merely because it is retroactive, unless the statute impairs contractual or other vested rights. Jenkins v. Hospital of Medical College of Pennsylvania, 535 Pa. 252, 634 A.2d 1099 (1993).

2 Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. 1993); Longbottom v. Mercy Hosp. Clermont, 137 Ohio St. 3d 103, 2013-Ohio-4068, 998 N.E.2d 419 (2013); In re Estate of Stewart, 545 S.W.3d 458 (Tenn. Ct. App. 2017), appeal denied, (Feb. 14, 2018).

3 DC Automotive, Inc. v. Kia Motors America, Inc., 411 F. Supp. 3d 1137 (D. Colo. 2019) (applying the Colorado constitution); Goldrush II v. City of Marietta, 267 Ga. 683, 482 S.E.2d 347 (1997).

Substantive rights, as well as vested rights, are included within those interests protected from retroactive application of statutes. In re Brown, 289 Va. 343, 770 S.E.2d 494 (2015).

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X. Retrospective Legislation

B. Other Retrospective Laws

1. General Constitutional Principles

c. Validity Under State Constitutions

§ 737. Operation and effect of state constitutional prohibitions on retrospective laws

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2785

A constitutional provision prohibiting retrospective laws covers laws which create a right where none before existed and which relate back so as to confer on a party the benefit of such right,[1] and also all such laws as take away or impair any vested right acquired under existing laws, create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already past.[2]

Observation:

The purpose of the constitutional prohibition against retroactive laws is to safeguard rights not guaranteed by other constitutional provisions such as the impairment of the obligation of contracts.[3]

A state constitutional proscription against retroactive legislation prohibits the impairment of vested rights,[4] the creation of new obligations or duties, or the attachment of new disabilities with respect to past transactions or considerations.[5]

A state constitutional provision barring the passage of retroactive laws protects only the rights of citizens;[6] hence, a state may constitutionally pass a retroactive law which impairs its own rights[7] and the rights of municipalities in such states,[8] although there is authority to the contrary.[9]

Retroactive application of legislation is not always forbidden by a state constitution.[10] A prohibition against retrospective legislation is not violated by a proper exercise of the police power of the state—that is, by the enactment of laws which, although they may operate directly on vested rights, are nevertheless promotive of justice and the general good.[11] Likewise, the courts have recognized that without violating a constitutional prohibition as to retrospective legislation, the state may make laws for the extenuation or mitigation of offenses[12] and, in general, laws curing defects in the remedy, confirming rights already existing, or adding to the means of securing and enforcing them.[13]

A statute is not retrospective in its operation within such a constitutional prohibition unless it impairs a vested right.[14] The retroactive application of a statute is not necessarily unconstitutional and is permitted when the statute effects a change that is merely procedural or remedial in nature.[15]

Footnotes

1 Bullard v. Holman, 184 Ga. 788, 193 S.E. 586, 113 A.L.R. 763 (1937); M & P Enterprises, Inc. v. Transamerica Financial Services, 944 S.W.2d 154 (Mo. 1997), as modified on denial of reh'g, (May 27, 1997).

2 DC Automotive, Inc. v. Kia Motors America, Inc., 411 F. Supp. 3d 1137 (D. Colo. 2019) (applying the Colorado constitution); M & P Enterprises, Inc. v. Transamerica Financial Services, 944 S.W.2d 154 (Mo. 1997), as modified on denial of reh'g, (May 27, 1997).
As to the impairment of vested rights, specifically, see §§ 741 to 746.
Impermissible retroactive application of statute occurs when it is applied to divest or impair vested rights acquired under prior law, or when it creates new obligation, imposes new duty, or attaches new disability in respect to transactions already passed. Bull Lake Fire Dist. v. Lincoln County, 2013 MT 342, 372 Mont. 469, 313 P.3d 174 (2013).
A state constitutional provision governing retrospective laws applies only to retrospective statutes that create new rights, take away vested rights, or impair existing contractual obligations. In re Estate of Stewart, 545 S.W.3d 458 (Tenn. Ct. App. 2017), appeal denied, (Feb. 14, 2018).
The retroactivity clause of the state constitution nullifies those new laws that reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective. Longbottom v. Mercy Hosp. Clermont, 137 Ohio St. 3d 103, 2013-Ohio-4068, 998 N.E.2d 419 (2013).

3 Cardenas v. State, 683 S.W.2d 128 (Tex. App. San Antonio 1984).
As to the impairment of contractual obligations, generally, see §§ 769 to 776.

4 Jones v. State, 883 N.W.2d 596 (Minn. 2016); M & P Enterprises, Inc. v. Transamerica Financial Services, 944 S.W.2d 154 (Mo. 1997), as modified on denial of reh'g, (May 27, 1997).

5 Zaragoza v. Director of Dept. of Revenue, 702 P.2d 274 (Colo. 1985); Jones v. State, 883 N.W.2d 596 (Minn. 2016); City of St. Peters v. Roeder, 466 S.W.3d 538 (Mo. 2015).

6 State Highway Dept. of Georgia v. Bass, 197 Ga. 356, 29 S.E.2d 161 (1944).

7 State Highway Dept. of Georgia v. Bass, 197 Ga. 356, 29 S.E.2d 161 (1944); State ex rel. Meyer v. Cobb, 467 S.W.2d 854 (Mo. 1971).

8 Rousselle v. Plaquemines Parish School Bd., 633 So. 2d 1235, 90 Ed. Law Rep. 519 (La. 1994); Town of Nottingham v. Harvey, 120 N.H. 889, 424 A.2d 1125 (1980).

9 State ex rel. City of South Euclid v. Zangerle, 145 Ohio St. 433, 31 Ohio Op. 57, 62 N.E.2d 160 (1945) (wherein the court recognized that any statute that impairs or takes away a municipality's vested right would be retroactive and invalid).

10 Bielat v. Bielat, 87 Ohio St. 3d 350, 2000-Ohio-451, 721 N.E.2d 28 (2000).

11 Addison v. Addison, 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897, 14 A.L.R.3d 391 (1965).

12 State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)).

13 State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)); In re Nevius, 174 Ohio St. 560, 23 Ohio Op. 2d 239, 191 N.E.2d 166 (1963).

The Colorado Constitution prohibits the legislature from passing civil laws that operate retroactively; however, procedural or remedial statutes which do not effect preexisting rights or obligations may be applied retroactively. Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

14 Phillips v. City of West Palm Beach, 70 So. 2d 345 (Fla. 1953); State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)); Massey v. Sullivan County, 225 Tenn. 132, 464 S.W.2d 548 (1971).

As to the impairment of vested rights, specifically, see §§ 741 to 746.

A retroactive statute is substantive and therefore unconstitutionally retroactive if it impairs vested rights. Bielat v. Bielat, 87 Ohio St. 3d 350, 2000-Ohio-451, 721 N.E.2d 28 (2000).

15 Kuhn v. State, 924 P.2d 1053 (Colo. 1996); Wilson v. Braeuer, 788 S.W.2d 186 (Tex. App. Houston 14th Dist. 1990), writ denied, (Sept. 19, 1990).

As to remedial legislation, generally, see §§ 744, 745.

A purely remedial statute does not violate the retroactivity clause of the state constitution, even when it is applied retroactively. Bielat v. Bielat, 87 Ohio St. 3d 350, 2000-Ohio-451, 721 N.E.2d 28 (2000).

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

a. Definition and Nature of Vested Rights

§ 738. Definition of vested rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2631 to 2655

Generally speaking, a "vested right" is a term that is used to describe rights that cannot be taken away by retroactive legislation.[1] It is a right which is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust.[2] In other words, a vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice.[3] It is a right so fixed that it is not dependent on any future act, contingency, or decision to make it more secure,[4] a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.[5] A vested right must be a contract right, a property right, or a right arising from a transaction in the nature of a contract which has become perfected to the degree that it is not dependent on the continued existence of a statute or the common law,[6] but rather has an independent existence.[7] The term is used to describe rights that cannot be taken away by retroactive legislation, since retroactive legislation affecting vested rights would constitute a taking of property without due process.[8]

A "vested right" is simply a right that, under particular circumstances, will be protected from legislative interference; a vested right is an immediate right of present enjoyment or a present fixed right of future enjoyment.[9] Vested rights include not only legal or equitable title to enforcement of a demand but also an exemption from new obligations created after the right has vested.[10]

To be vested, a right must be absolute, complete and unconditional, independent of a contingency;[11] and a mere expectancy of future benefit does not constitute a vested right.[12]

There is no vested right to benefits which one was never entitled to receive.[13]

There can be no vested right in unlawful conduct.[14] Moreover, no one acquires a vested or protected right in violation of the Constitution by long use,[15] even when that span of time covers our entire national existence and indeed predates it.[16]

The distinction between statutory privileges and vested rights must be borne in mind, for the citizen has no vested rights in statutory privileges and exemptions.[17] Whether the legislature in a particular situation acted beyond its power with respect to vested rights can only be determined from the nature of the alleged rights and the character of the change the legislature authorized.[18]

Footnotes

1 Gardner v. Gardner, 22 Kan. App. 2d 314, 916 P.2d 43 (1996).

2 Hall v. Elected Officials' Retirement Plan, 241 Ariz. 33, 383 P.3d 1107 (2016).

3 Doe v. California Dept. of Justice, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (4th Dist. 2009).

4 State v. Spencer Gifts, LLC, 304 Kan. 755, 374 P.3d 680 (2016).

5 Maytag Corp. v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America, 687 F.3d 1076 (8th Cir. 2012).

6 DC Automotive, Inc. v. Kia Motors America, Inc., 411 F. Supp. 3d 1137 (D. Colo. 2019) (applying the Colorado constitution); Hickman v. Catholic Health Initiatives, 2013 COA 129, 328 P.3d 266 (Colo. App. 2013).

7 In re Marriage of Weekes, 2020 COA 16, 2020 WL 479054 (Colo. App. 2020).

8 Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297 (1997).
Due process, generally, see §§ 933 to 1017.

9 Estate of Zimmerman v. Blatter, 458 Md. 698, 183 A.3d 223 (2018).

10 Yaeger v. Delano Granite Works, 250 Minn. 303, 84 N.W.2d 363 (1957).

11 Ebinger v. Venus Const. Corp., 65 So. 3d 1279 (La. 2011).

12 Jarvis v. National City, 410 S.W.3d 148 (Ky. 2013); Ebinger v. Venus Const. Corp., 65 So. 3d 1279 (La. 2011).

13 Employees' Retirement System of Georgia v. Melton, 294 Ga. App. 634, 669 S.E.2d 692 (2008) (disapproved of on other grounds by, Wolfe v. Boards of Regents of the University System of Georgia, 300 Ga. 223, 794 S.E.2d 85, 338 Ed. Law Rep. 1119 (2016)).

14 City of Yonkers v. Rentways, Inc., 304 N.Y. 499, 109 N.E.2d 597 (1952).

15 Committee For Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973) (involving state aid to nonpublic schools); Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (involving property tax exemptions for religious organizations).

16 Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

17 Beisner v. Cochran, 138 Neb. 445, 293 N.W. 289 (1940); Anthony v. Veatch, 189 Or. 462, 220 P.2d 493 (1950).
There is a definite distinction between the effect to be given a retroactive statute when it relates to private rights, and when it relates to public rights; public rights may always be modified or annulled by subsequent legislation without contravening the due process clause. Holen v. Minneapolis-St. Paul Metropolitan Airports Commission, 250 Minn. 130, 84 N.W.2d 282 (1957).

18 Garzo v. Maid of the Mist Steamboat Co., 303 N.Y. 516, 104 N.E.2d 882 (1952).

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

a. Definition and Nature of Vested Rights

§ 739. Nature and origin of vested rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2631 to 2655

Vested rights may be created by the common law, by statute, or by contract.[1] The mere fact that the enactment of a statute may have been dictated by public policy does not preclude the acquisition of vested rights thereunder.[2] On the other hand, it has also been held that where a statute gives certain rights of action upon grounds of public policy, no vested rights as to the continuance thereof are conferred.[3]

Practice Tip:

It is presumed that a statutory scheme is not intended to create private contractual or vested rights, and a party claiming otherwise must overcome the presumption.[4]

Footnotes

1 Pfeifer v. Ableidinger, 166 Neb. 464, 89 N.W.2d 568 (1958); Coen v. SemGroup Energy Partners G.P., LLC, 2013 OK CIV APP 75, 310 P.3d 657 (Div. 4 2013).

2 Pfeifer v. Ableidinger, 166 Neb. 464, 89 N.W.2d 568 (1958).

3 Hickman v. Catholic Health Initiatives, 2013 COA 129, 328 P.3d 266 (Colo. App. 2013).

4 Doe v. California Dept. of Justice, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (4th Dist. 2009); Big John's Billiards, Inc. v. State, 288 Neb. 938, 852 N.W.2d 727 (2014).

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

a. Definition and Nature of Vested Rights

§ 740. Absence of vested rights in existing law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2631 to 2655

There is no vested right in the continuation of a current law[1] that entitles a person to insist it shall remain unchanged for his or her future benefit.[2] Every citizen in making his or her arrangements in reliance on the continued existence of laws takes on the risk of the laws being changed, and the state incurs no responsibility in consequence of the change proving injurious to private interests.[3] A vested right, entitled to be protected from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law;[4] it must have become a title, legal or equitable, to the present or future enjoyment of property[5] or enforcement of a demand.[6] Once the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest, the right is vested and thus protected by due process guarantees.[7] Moreover, a right is vested if it survives the repeal of a statute or the abrogation of the common law from which it may have originated.[8]

Footnotes

1 Alwan v. Kickapoo-Edwards Land Trust, 2018 IL App (3d) 170165, 419 Ill. Dec. 600, 93 N.E.3d 719 (App. Ct. 3d Dist. 2018); Texas Dept. of Ins. v. State Farm Lloyds, 260 S.W.3d 233 (Tex. App. Austin 2008).
An expectancy cannot be the basis for a claim of vested rights; an insured's expectancy of a covered claim to be paid by the Florida Insurance Guaranty Association if the insurer becomes insolvent cannot be the

basis for a claim of vested rights precluding retroactive application of statute governing the Association. de la Fuente v. Florida Ins. Guar. Ass'n, 202 So. 3d 396 (Fla. 2016).

2 Hickman v. Catholic Health Initiatives, 2013 COA 129, 328 P.3d 266 (Colo. App. 2013); State ex rel. Schottel v. Harman, 208 S.W.3d 889 (Mo. 2006).

3 Pfeifer v. Ableidinger, 166 Neb. 464, 89 N.W.2d 568 (1958).

Statutes governing wages, working conditions, and benefits of public employees do not create any vested rights in their continued existence. Proctor v. McNeil, 14 F. Supp. 3d 1108, 310 Ed. Law Rep. 157 (N.D. Ill. 2014).

4 DC Automotive, Inc. v. Kia Motors America, Inc., 411 F. Supp. 3d 1137 (D. Colo. 2019) (applying the Colorado constitution); GreenPoint Mortg. Funding, Inc. v. Poniewozik, 2014 IL App (1st) 132864, 387 Ill. Dec. 833, 23 N.E.3d 525 (App. Ct. 1st Dist. 2014); Dabbs v. Anne Arundel County, 458 Md. 331, 182 A.3d 798 (2018), cert. denied, 139 S. Ct. 230, 202 L. Ed. 2d 127 (2018).

5 Big John's Billiards, Inc. v. State, 288 Neb. 938, 852 N.W.2d 727 (2014).

6 Gulf Atlantic Office Properties, Inc. v. Department Of Revenue, 133 So. 3d 537 (Fla. 2d DCA 2014).

7 Church Mut. Ins. Co. v. Dardar, 145 So. 3d 271 (La. 2014).

8 DC Automotive, Inc. v. Kia Motors America, Inc., 411 F. Supp. 3d 1137 (D. Colo. 2019) (applying the Colorado constitution).

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Constitutional Law

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

b. Constitutional Issues in Impairing Vested Rights

§ 741. Determination that vested rights are impaired

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2792

A law may be unconstitutional through its retrospective operation,[1] whereby it impairs vested rights.[2]

There are four factors to consider when deciding whether a retrospective law impairs a vested right, namely: (1) whether a retrospective application of the statute advances or impedes the public interest, (2) whether a retrospective application gives effect to or defeats the bona fide intentions or reasonable expectations of the persons involved, (3) whether the new statute surprises individuals who have long relied on a contrary state of the law, and (4) the extent to which a statute appears to be procedural or remedial; none of the factors are dispositive, and because factors (2) and (3) are closely related, they can be analyzed together.[3]

As also stated, whether a law unconstitutionally "impairs vested rights" in violation of the state constitution's prohibition against retroactive laws is decided by whether it takes away what should not be taken away.[4] However, as long as the application of a new law does not burden a vested right, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give the new statute its intended scope.[5]

Footnotes

1 §§ 734 to 737.

2 Jensen v. North Dakota Workers Compensation Bureau, 1997 ND 107, 563 N.W.2d 112 (N.D. 1997); In re S.T., 467 S.W.3d 720 (Tex. App. Fort Worth 2015).
Generally, a vested right cannot be taken away once created. Navlet v. Port of Seattle, 164 Wash. 2d 818, 194 P.3d 221 (2008).

3 In re Estate of Stewart, 545 S.W.3d 458 (Tenn. Ct. App. 2017), appeal denied, (Feb. 14, 2018).

4 In re S.T., 467 S.W.3d 720 (Tex. App. Fort Worth 2015).

5 Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016); Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

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16B Am. Jur. 2d Constitutional Law § 742

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

b. Constitutional Issues in Impairing Vested Rights

§ 742. Specific constitutional violation caused by impairment of vested rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2630, 2792

Legislation which impairs vested rights may be invalid as amounting to a taking of property without due process of law,[1] although the phrase "vested rights" is nowhere used in the Federal Constitution.[2] This is also true in the majority of state constitutions; nevertheless, statutes retrospective in their character and operation, directly affecting and divesting vested rights, are very generally considered as founded on unconstitutional principles and consequently inoperative and void.[3]

A vested right has also been defined as a common law right protected by both a state's constitutional Due Process Clause as well as the Fifth and Fourteenth Amendments of the United States Constitution,[4] prohibiting Congress or the state from enacting laws which would impair a party's right to contract.[5]

Observation:

In the case of one state's constitutional prohibition against retrospective laws, the court found that it was broader than the federal proscription of ex post facto laws, where, among other provisions, the state right prohibited a law that impairs a vested right.[6]

Footnotes

1 Goldrush II v. City of Marietta, 267 Ga. 683, 482 S.E.2d 347 (1997).
Retrospective legislation causing impairment of rights, see §§ 734 to 737.
Impact of retroactive changes on procedural or remedial statutes on vested rights, see §§ 744, 745.
Due process, generally, see §§ 933 to 1017.

2 Campbell v. Holt, 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885).

3 Jensen v. North Dakota Workers Compensation Bureau, 1997 ND 107, 563 N.W.2d 112 (N.D. 1997); King County v. Taxpayers of King County, 132 Wash. 2d 360, 938 P.2d 309 (1997).

4 U.S. Const. Amends. V, XIV.

5 Mission Hospitals, Inc. v. North Carolina Dept. of Health and Human Services, Div. of Health Service Regulation, 205 N.C. App. 35, 696 S.E.2d 163 (2010).

6 Reynolds v. Missouri Board of Probation and Parole, 468 S.W.3d 413 (Mo. Ct. App. W.D. 2015).

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

c. Particular Legislation as Effecting Impairment

§ 743. Divestment of vested rights by legislature

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2632, 2792

There can be no divesting of vested rights by legislative fiat.[1] A state cannot by a mere act of the legislature take property from one person and vest it in another directly; nor can such property, by the retrospective operation of laws, be indirectly transferred from one to another.[2] In addition, retroactive laws cannot change final judicial decisions as to the particular parties whose rights were adjudicated.[3] Nevertheless, Congress may direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.[4]

Footnotes

1 United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 257 A.D. 501, 257 A.D. 1085, 14 N.Y.S.2d 74 (3d Dep't 1939).

2 Ochoa v. Hernandez y Morales, 230 U.S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427 (1913).
Indirect effects on pension entitlements do not convert an otherwise unvested benefit into one that is constitutionally protected. San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System, 568 F.3d 725 (9th Cir. 2009).

3 Petition of Kirchner, 164 Ill. 2d 468, 208 Ill. Dec. 268, 649 N.E.2d 324 (1995) (abrogated on other grounds by, In re R.L.S., 218 Ill. 2d 428, 300 Ill. Dec. 350, 844 N.E.2d 22 (2006)).

Once a defendant has lawfully secured dismissal for a statutory speedy trial violation, the right has vested and charges cannot be resurrected by a court's subsequent change to the law surrounding statutory speedy trial. State v. Spencer Gifts, LLC, 304 Kan. 755, 374 P.3d 680 (2016).

Having achieved finality, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the court said it was. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).

4 Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

Congress has constitutional authority to overrule the United States Supreme Court retroactively, so long as vested rights are not affected. Sherrill v. Sherrill, 639 So. 2d 794 (La. Ct. App. 2d Cir. 1994).

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

c. Particular Legislation as Effecting Impairment

§ 744. Procedural or remedial legislation as impairing vested rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2649 to 2652

Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.[1] A procedural law, for purposes of determining whether it should be construed prospectively or retroactively, sets out a mode of procedure for a court to follow, or prescribes a method of enforcing rights.[2] It has become firmly established that there is no vested right in any particular mode of procedure or remedy.[3] Even the promulgation of a new jury trial rule would ordinarily not warrant the retrial of cases previously tried to a judge.[4] Since a vested right to a remedy devolves only from the legislature, there is no property or vested right in any of the rules of the common law.[5]

A statute that is procedural or remedial and does not create, enlarge, diminish or destroy contractual or vested rights is generally held not to be a retroactive statute, even though it was enacted subsequent to the events to which it operates.[6] Moreover, the abolition of an old remedy, or the substitution of a new one, does not constitute the impairment of a vested right, for purposes of determining whether retroactive application of a statutory change is unconstitutional.[7] Indeed, the legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.[8] However, even if a statute is procedural or remedial, this does not completely address whether the statute may be applied retroactively; generally, a remedial or procedural statute may not be applied retroactively if it will interfere with vested or substantive rights.[9] Thus, while a statute is remedial where it creates new remedies for existing rights and should be construed retroactively, it should not be construed retroactively where it violates a contractual obligation, creates a new right, or divests a vested right.[10]

Footnotes

1 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (holding that because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at the trial "retroactive"); People v. McCreadie, 938 P.2d 528 (Colo. 1997).

If new legislation or an amendment is procedural, it may be applied retrospectively. Alwan v. Kickapoo-Edwards Land Trust, 2018 IL App (3d) 170165, 419 Ill. Dec. 600, 93 N.E.3d 719 (App. Ct. 3d Dist. 2018).

2 Gatewood v. South Carolina Dept. of Corrections, 416 S.C. 304, 785 S.E.2d 600 (Ct. App. 2016), cert. denied and cert. denied.

3 Ex parte Collett, 337 U.S. 55, 69 S. Ct. 944, 93 L. Ed. 1207, 10 A.L.R.2d 921 (1949); State v. Cota, 234 Ariz. 180, 319 P.3d 242 (Ct. App. Div. 2 2014); San Diegans for Open Government v. City of San Diego, 247 Cal. App. 4th 1306, 203 Cal. Rptr. 3d 34 (4th Dist. 2016); In re Marriage of Weekes, 2020 COA 16, 2020 WL 479054 (Colo. App. 2020); Laura M. Watson, P.A. v. Stewart Tilghman Fox & Bianchi, P.A., 162 So. 3d 102 (Fla. 4th DCA 2014); Alwan v. Kickapoo-Edwards Land Trust, 2018 IL App (3d) 170165, 419 Ill. Dec. 600, 93 N.E.3d 719 (App. Ct. 3d Dist. 2018).

No right is destroyed when the law restores a remedy which had been lost. Buhl v. City of Oak Park, 2019 WL 4126130 (Mich. Ct. App. 2019).

4 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

5 Antoon v. Cleveland Clinic Found., 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.3d 974 (2016).

6 Florida Birth-Related Neurological Injury Compensation Ass'n v. DeMarko, 640 So. 2d 181 (Fla. 1st DCA 1994); State v. Tollman, 162 Idaho 798, 405 P.3d 583 (2017).

7 In re Marriage of Weekes, 2020 COA 16, 2020 WL 479054 (Colo. App. 2020).

8 Daidone v. Buterick Bulkheading, 191 N.J. 557, 924 A.2d 1193 (2007).

9 State v. Spencer Gifts, LLC, 304 Kan. 755, 374 P.3d 680 (2016); Estate of Zimmerman v. Blatter, 458 Md. 698, 183 A.3d 223 (2018); In re Commitment of Hager, 2018 WI 40, 381 Wis. 2d 74, 911 N.W.2d 17 (2018).

If a statute is procedural or remedial, rather than substantive, the statute is generally given retroactive application unless retroactive application would impair contracts or disturb vested rights. Lands' End, Inc. v. City of Dodgeville, 2016 WI 64, 370 Wis. 2d 500, 881 N.W.2d 702 (2016).

10 Gatewood v. South Carolina Dept. of Corrections, 416 S.C. 304, 785 S.E.2d 600 (Ct. App. 2016), cert. denied and cert. denied.

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

c. Particular Legislation as Effecting Impairment

§ 745. Procedural or remedial legislation as impairing vested rights—Effect on pending actions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2649 to 2652

A statute governing procedure or remedy will be applied to cases pending in court when the statute becomes effective.[1] As a general rule, where there is no direct constitutional prohibition,[2] the legislative branch of government, whether federal or state, may pass retrospective laws, such as, in their operation, may affect suits that are pending[3] and give to a party a remedy which he or she did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings; such acts are of a remedial character and are the proper subjects of legislation.[4] Absent an express directive from Congress, a court must apply a newly enacted statute to pending cases unless doing so would give the statute a retroactive effect, that is, a court must determine whether the new provision attaches new legal consequences to events completed before its enactment.[5] A "pending case" protected by a state constitution from being affected by an act of the legislature includes a taxpayer's request for a refund.[6] A statute merely affecting the remedy may apply to, and operate on, causes of action which had accrued and were existing at the time of the enactment of the statute, as well as to causes of action thereafter to accrue, and to all actions, whether commenced before or after its enactment.[7] Thus, the application of a statute to a subsisting claim for relief does not violate the prohibition of retrospective legislation where the statute effects a change that is only procedural or remedial in nature.[8] Indeed, the application of a statute is not rendered retrospective merely because the facts upon which it operates occurred before the adoption of the statute, and although imposition of a new disability may make a statute retrospective, a court will so conclude only if the statute imposes a disability of constitutional magnitude.[9]

There is no vested right in particular rules of evidence or in rules relating to jurisdiction of the court over parties to a lawsuit,[10] and the legislature has full power to alter such rules and the degree of proof required in pending cases.[11] Similarly, no one has a vested right in a measure of damages.[12] Although the United States Supreme Court did hold that provisions of the Civil Rights Act of 1991, creating a right to recover compensatory and punitive damages for certain violations of Title VII and providing for trial by jury if such damages are claimed, did not apply to a Title VII case pending on appeal when the statute was enacted,[13] this would not appear to change the general rule that no ex post facto violation occurs because the state has enacted a different method of taking an appeal or other proceeding for a review.[14]

One method by which a pending suit is sometimes affected is the repeal of the statute under which it was brought; it is clear that after such repeal no judgment can be rendered in a pending suit because a case must be determined on the law as it stands at the time judgment is rendered, and the theory is that until the final decree is passed there is no vested right to be disturbed.[15] It is beyond dispute that once a judgment has become final, Congress cannot pass legislation affecting the rights of parties to such final judgment or requiring its revision.[16]

No one has any vested right in a statute of limitations[17] until the bar of the statute has become effective.[18] Stated conversely, only accrued causes of action present vested, substantive rights that the legislature cannot retroactively extinguish through imposition or modification of a statute of limitations or repose.[19]

Footnotes

1 Johnson v. Mayor and City Council of Baltimore, 203 Md. App. 673, 40 A.3d 475 (2012), judgment aff'd, 430 Md. 368, 61 A.3d 33 (2013).

2 Mott v. Sun Country Garden Products, Inc., 120 N.M. 261, 1995-NMCA-066, 901 P.2d 192 (Ct. App. 1995).

3 Florida Birth-Related Neurological Injury Compensation Ass'n v. DeMarko, 640 So. 2d 181 (Fla. 1st DCA 1994); Mandel v. City of Santa Fe, 119 N.M. 685, 1995-NMCA-052, 894 P.2d 1041 (Ct. App. 1995).

4 Larson v. Independent School Dist. No. 314, 305 Minn. 358, 233 N.W.2d 744 (1975).
Congress has the unquestioned right to make economic legislation retroactive, if this does not require revision of a judgment that has become final. Ferman v. U.S., 993 F.2d 485 (5th Cir. 1993); Baker v. GTE North Inc., 110 F.3d 28 (7th Cir. 1997).

5 Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997).

6 Phelps Dodge Corp. v. Revenue Div. of Dept. of Taxation and Revenue of State of N.M., 103 N.M. 20, 1985-NMCA-055, 702 P.2d 10 (Ct. App. 1985).

7 Ohlinger v. U. S., 135 F. Supp. 40 (D. Idaho 1955).
The application of a statute is not rendered retrospective merely because the facts upon which it operates occurred before the adoption of the statute. Hickman v. Catholic Health Initiatives, 2013 COA 129, 328 P.3d 266 (Colo. App. 2013).

8 In re Marriage of Weekes, 2020 COA 16, 2020 WL 479054 (Colo. App. 2020).

9 Hickman v. Catholic Health Initiatives, 2013 COA 129, 328 P.3d 266 (Colo. App. 2013).

10 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); Florida Birth-Related Neurological Injury Compensation Ass'n v. DeMarko, 640 So. 2d 181 (Fla. 1st DCA 1994).

11 Brewer v. Aetna Life Ins. Co., 490 S.W.2d 506 (Tenn. 1973).

12 Feckenscher v. Gamble, 12 Cal. 2d 482, 85 P.2d 885 (1938).
For purposes of determining retroactivity, retroactive modification of damages remedies may normally harbor much less potential for mischief than retroactive changes in the principles of liability, but that potential is nevertheless still significant. Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

13 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

14 Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 128 P.2d 522, 141 A.L.R. 1358 (1942).

15 I.L.F.Y. Co. v. Temporary State Housing Rent Commission, 10 N.Y.2d 263, 219 N.Y.S.2d 249, 176 N.E.2d 822 (1961).

16 Baker v. GTE North Inc., 110 F.3d 28 (7th Cir. 1997).

17 State v. Dupree, 304 Kan. 43, 371 P.3d 862 (2016).

18 Reeves v. State, 374 Ark. 415, 288 S.W.3d 577 (2008).

19 Bill Swad Chevrolet, Inc. v. Dunson, 2019-Ohio-680, 132 N.E.3d 234 (Ohio Ct. App. 10th Dist. Franklin County 2019), appeal not allowed, 156 Ohio St. 3d 1446, 2019-Ohio-2498, 125 N.E.3d 916 (2019).

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X. Retrospective Legislation

B. Other Retrospective Laws

2. Impairment of Vested Rights

c. Particular Legislation as Effecting Impairment

§ 746. Effect of curative legislation on vested rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2633, 2640

A legislative intent of retroactivity can be shown when an amendment is curative.[1] Curative statutes are a form of retrospective legislation reaching back to past events to correct errors or irregularities and to render valid and effective attempted acts which would otherwise be ineffective for the purpose the parties intended, particularly irregularities in conveyancing requirements; they operate to complete a transaction which the parties intended to accomplish but carried out imperfectly.[2] A curative statute may be enacted to cure or validate errors or irregularities in legal or administrative proceedings,[3] except such as are jurisdictional or affect substantive vested rights,[4] and also to cure or to give effect to contracts between parties which might otherwise be invalid for failure to comply with technical legal requirements.[5] On the other hand, a curative statute cannot cure retroactively a failure to observe constitutional requirements.[6] Thus, a curative act cannot operate to validate defects in proceedings which deprive a person of procedural due process.[7] Nor may a curative act operate so as to deprive a property owner of his or her property without due process of law.[8]

The ratification of a tax already imposed and collected cannot be equated with the retroactive imposition of a new tax for purposes of determining the constitutionality of retroactive application of a curative act; curative acts do not impair any vested right of the taxpayer, and there is no litmus test for a reasonable period of retroactivity for curative acts.[9]

A curative act may even be effective on pending litigation.[10]

Footnotes

1 R.L.U. v. J.P., 457 N.J. Super. 129, 198 A.3d 304 (App. Div. 2018).

2 Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816 (1957).
A municipality may not correct a defective rent control ordinance by retroactively enacting another ordinance that by its terms interferes with contract rights established during a period between the defective and retroactive ordinances. South Hamilton Associates v. Mayor and Council of Town of Morristown, 99 N.J. 437, 493 A.2d 523 (1985).

3 Horton v. Carter, 253 Ala. 325, 45 So. 2d 10 (1950).

4 Miller v. McKenna, 23 Cal. 2d 774, 147 P.2d 531 (1944).

5 Beeler & Campbell Supply Co. v. Warren, 151 Kan. 755, 100 P.2d 700 (1940).

6 S & R Properties v. Maricopa County, 178 Ariz. 491, 875 P.2d 150 (Ct. App. Div. 1 1993).

7 Saunders v. Carr, 268 Cal. App. 2d 10, 74 Cal. Rptr. 147 (2d Dist. 1968).

8 In re Bunker Hill Urban Renewal Project 1B of Community Redevelopment Agency of City of Los Angeles, 61 Cal. 2d 21, 37 Cal. Rptr. 74, 389 P.2d 538 (1964).

9 Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010) (also holding that ratification of a tax collected without authority is given full retroactivity so long as the retroactivity furthers a legitimate purpose).

10 Litchfield v. Marin County, 130 Cal. App. 2d 806, 280 P.2d 117 (1st Dist. 1955).

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